ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2005

Ms. Catherine Zellers
City of Weatherford
P.O. Box 255
Weatherford, Texas 76086

OR2005-11575

Dear Ms. Zellers:

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# 238646.

The City of Weatherford (the "city") received a request for a named individual's personnel file. You state you have released some information to the requestor, but claim that portions of the submitted information are excepted from disclosure under sections 552.102, 552.108, 552.111, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). We note that the city received the present request on September 26, 2005. However, you did not request a ruling from this office until October 12, 2005. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists for withholding the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although the city raises sections 552.108 and 552.111 for this information,

these sections are discretionary and do n ıstitute compelling interests sufficient enough to overcome the presumption that the inf ıtion at issue is now public. *See* Open Records Decision No. 177 (1977) (governme body may waive statutory predecessor to section 552.108); *see also* Open Recor ecision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, we lude that the city may not withhold any portion of the submitted information under e section 552.108 or section 552.111 of the Government Code. However, because se ıs 552.102 and 552.119 can provide compelling reasons to withhold information, we wi lress your arguments regarding these sections.

Section 552.101 excepts from disclosure formation considered to be confidential by law, either constitutional, statutory, or by jud lecision." Gov't Code § 552.101. This section encompasses information protected by o statutes. We note that a portion of the submitted information is subject to the Family M al Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Sec 25.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record ping requirements for employers that are subject to the FMLA. Subsection (g) of sectio .500 states that

> [r]ecords and documents relatin ıedical certifications, recertifications or medical histories of employees nployees' family members, created for purposes of FMLA, shall be m ned as confidential medical records in separate files/records from the l personnel files, and if ADA is also applicable, such records shall ıaintained in conformance with ADA confidentiality requirements[], ıt that:
>
> > (1) Supervisors and ma rs may be informed regarding necessary restrictions on the wor duties of an employee and necessary accommodations;
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> > (2) First aid and safety p nel may be informed (when appropriate) if the employee's phy or medical condition might require emergency treatment; a
> >
> > (3) Government officia estigating compliance with FMLA (or other pertinent law) sl e provided relevant information upon request.

29 C.F.R. § 825.500(g). We have m l the information that is subject to the FMLA. Further, we find that none of the rel provisions of the FMLA apply to this marked information. Thus, we conclude that t ıarked information is excepted from disclosure pursuant to section 552.101 of the Go ıent Code in conjunction with the FMLA.

Next, we note that the submitted ıents include an I-9 Employment Eligibility Verification Form. Title 8, section 4a of the United States Code, which is also encompassed by section 552.101, prov hat this 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 form under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the submitted I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We further note that a portion of the submitted information constitutes a medical record that is subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (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(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of 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. *See* Occ. Code §§ 159.004, .005. The consent must specify (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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical record information that is subject to the MPA. Thus, absent the applicability of an MPA access provision, the city must withhold this marked information pursuant to the MPA.

We note that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with the Americans with Disabilities Act. Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides

that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the city must withhold under section 552.101 in conjunction with the ADA.

We note that the submitted information includes an F-5 (Report of Resignation or Separation of License Holder) form. Section 552.101 also encompasses chapter 1701 of the Occupations Code, which is applicable to the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). Section 1701.454 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:
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>> (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. The city must withhold the submitted F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The information submitted by the city also contains a W-4 form. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the city must withhold this form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

You claim that a portion of the submitted information is subject to section 552.102 of the Government Code, which 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. 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Consequently, we will consider these two exceptions together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. 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 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); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history); and certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care).

We have marked portions of the submitted information that must be withheld pursuant to section 552.101 in conjunction with common law privacy. We find, however, that you have failed to establish how any portion of the remaining submitted information constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Furthermore, it appears that a portion of the information at issue pertains to the work-related qualifications of a city employee, in which the public has a legitimate interest. *See* Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). Thus, the city must withhold only the information we have marked under common law privacy.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who timely and specifically requests that this information be kept confidential under section 552.024.[1] The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, a governmental body may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality under section 552.024 prior to the governmental body's receipt of the request for the information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election to keep the information confidential. Therefore, the city must withhold the information that we have marked under section 552.117(a)(1).

The submitted documents also contain information that relates to individuals who appear to be employed as police officers with the Weatherford Police Department. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the information that we have marked under section 552.117 relates to a peace officer employed by Weatherford, the city must withhold that information under section 552.117(a)(2).

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[1]We note that a post office box number is not a "home address" for purposes of section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing 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 also note that some of the submitted information appears to relate to peace officers of a governmental body other than the Weatherford Police Department. With regard to that information, section 552.1175 of the Government Code provides in part:

> (a) This section applies only to:
>
> > (1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]
>
> (b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, 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(a)(1), (b). Thus, to the extent the information we have marked relates to a peace officer who elects to restrict access to the information in accordance with section 552.1175(b), the information that we have marked under section 552.1175 must be withheld from disclosure.

You raise section 552.119 of the Government Code for photographs on pages 134, 212, and 244 of the submitted information. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. Gov't Code §552.119. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. In this instance, you have not demonstrated that release of the photographs would endanger the life or physical safety of any officer. We therefore determine that the city may not withhold the submitted photographs pursuant to section 552.119 of the Government Code.

We also note that the remaining submitted information contains Texas motor vehicle record information. 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 we have marked pursuant to section 552.130.

We note that submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 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). 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 addresses at issue in the remaining submitted information are not a type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137, the city must withhold the marked e-mail addresses unless the city receives consent to release them.

In summary, the city must withhold (1) the information we have marked pursuant to section 552.101 in conjunction with the FMLA, (2) the submitted I-9 form under Title 8, section 1324a of the United States Code, (3) the information we have marked pursuant to the MPA, (4) the information we have marked under section 552.101 in conjunction with the ADA, (5) the submitted F-5 form pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code, (6) the submitted W-4 form under section 6103(a) of Title 26 of the United States Code, and (7) information we have marked pursuant to section 552.101 and common law privacy. The city must withhold the information we have marked pursuant to section 552.117(a)(1). The city must also withhold the information we have marked under section 552.117(a)(2) to the extent it pertains to a peace officer employed by Weatherford. The information marked under section 552.1175 must be withheld to the extent that it relates to a peace officer of another governmental body who elects to restrict access to the information in accordance with section 552.1175(b). The city must also withhold Texas motor vehicle record information and email addresses we have marked pursuant to sections 552.130 and 552.137, respectively. The remaining submitted information must be released to the requestor.[2]

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

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[2] Because some of the information is confidential with respect to the general public, if the city receives a future request for this information from an individual other than the requestor or her authorized representative, the city should again seek our decision.

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).

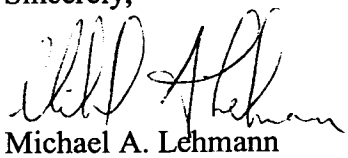
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/segh

Ref: ID# 238646

Enc. Submitted documents

c: Ms. Caroline Dabbs
1207 Julie Street
Wilford, Texas 76086
(w/o enclosures)