



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2007

Ms. Gita P. Bolt
General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2007-06820

Dear Ms. Bolt:

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# 280097.

Texas Southern University (the "university") received a request for the personnel files of three former university police department employees. You state that you have released some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you note that the information pertaining to Tyrone Walker was the subject of a previous request for information, in which your office requested a decision from this office. In response to this request, we issued Open Records Letter No. 2007-03704 (2007). In this letter ruling, we ruled that the university must withhold the information that is confidential pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. Next, we marked medical and mental health records that the university must withhold and may release only in accordance with the MPA and chapter 611 of the Health and Safety Code, respectively. We also ruled that the university must withhold the W-4 forms pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Furthermore, we held that if the named individual is still a peace officer, then the university must withhold his personal information pursuant to section 552.117(a)(2). However, if this individual is no longer a peace officer, then his personal information must be withheld pursuant to section 552.117(a)(1), if he timely elected. Finally, we held that the university must withhold the information that was excepted

from disclosure under sections 552.130 and 552.137 of the Government Code. We presume that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2007-03704. Thus, the university must continue to rely on Open Records Letter No. 2007-03704 for the information that was at issue in that prior ruling. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when: 1) the records or information at issue are precisely the same records or information that were previously submitted to this 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). For the information pertaining to the other two former officers that was not previously ruled upon, we will address the submitted arguments.

Section 552.101 of the Government Code 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 statute. 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 submitted W-4 forms constitute tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

Next, you claim the submitted documents contain information governed by section 1701.454 of the Occupations Code. Section 552.101 also encompasses section 1701.454. Section 1701.454 provides in relevant part that “[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(a). After reviewing the marked information, we do not find it is the form contemplated by section 1701.454 of the Occupations Code. Therefore, the university may not withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses chapter 611 of the Health and Safety Code. You assert that the information you marked is excepted under section 611.002(a), which reads as follows:

Communications 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, are confidential.

Health & Safety Code § 611.002. Upon review, we find that the information you have marked may not be withheld on this basis because it is not a communication between a patient and a professional.

Section 552.101 encompasses the Medical Practices Act ("MPA"). You claim that a portion of the submitted information consists of medical records, access to which is governed by the MPA. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

Id. § 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). The information in Tab B which pertains to the remaining two former peace officers does not contain information that was created by a physician; therefore, none of the information may be withheld on this basis.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal History Record Information ("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 the CHRI it generates. *See 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 in conjunction with chapter 411, subchapter F of the Government Code. The information you have marked is not CHRI generated by TCIC and NCIC. Accordingly, this information may not be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Next, you claim section 552.102. Section 552.102(a) of the Government Code 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 Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

For information to be protected from public disclosure by the common-law right of 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. 540 S.W.2d at 685. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure 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).

In addition, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee’s allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision No. 545 (1990). Likewise, an employee’s designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). We note that this office has found that the

public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that the university must withhold as confidential under sections 552.101 and 552.102 in conjunction with common-law privacy. We find, however, that you have not demonstrated how the remaining information you have marked is either intimate or embarrassing or is not of a legitimate public interest. Therefore, none of the remaining information you have marked is confidential under the doctrine of common-law privacy and it may not be withheld under section 552.101 or 552.102.

You state that the information contained in Tab C is excepted from disclosure under section 552.108(a)(2) and (b)(2). A governmental body claiming these subsections must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.108(a)(2), (b)(2). However, we note that section 552.108 generally is not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision Nos. 562 at 10 (1990), 350 at 3-4 (1982). The information in Tab C relates to internal administrative investigations by the university. You have not demonstrated, and the information at issue does not indicate, that these documents are related to criminal investigations or prosecutions. Accordingly, the university may not withhold any of the information in Tab C under section 552.108(a)(2) or (b)(2).

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). 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 section 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). In this case, the individuals at issue are no longer employed as officers by the university. If the named individuals remain licensed peace officers as defined by article 2.12, the university must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the named former university officers are no longer peace officers or security officers, then their personal information may be excepted under section 552.117(a)(1) of the Government

Code.¹ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) if the former university officers elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former officers timely elected, the university must withhold the marked personal information regardless of whether they are still peace officers or security officers. The university may not withhold this information under section 552.117(a)(1), however, if the former officers did not make timely elections to keep the information confidential.

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. We note that section 552.130 is not applicable to out-of-state motor vehicle information. The university must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

¹The 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).

Id. § 552.136. Upon review, we find you have failed to explain how the numbers you have marked constitute access device numbers for purposes of section 552.136. Accordingly, none of the information may be withheld under section 552.136 of the Government Code.

Section 552.137(a) of the Government Code states that “[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.” *Id.* § 552.137(a). This section excepts from disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, the university may not withhold the email address it marked pursuant to section 552.137.

Section 552.147 of the Government Code provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. The social security numbers we have marked may be withheld under section 552.147 of the Government Code.

In summary, the university must continue to rely on our ruling in Open Records Letter No. 2007-03704, with respect to the information pertaining to Tyrone Walker that is also at issue in this request. The university must withhold the submitted W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The university must withhold the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy. If the named individuals at issue remain licensed peace officers as defined by article 2.12 or security officers commissioned under section 51.212 of the Education Code, the university must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the named former university officers are no longer peace officers or security officers, then the university must withhold the marked personal information under section 552.117(a)(1) of the Government Code, if the former officers timely elected under section 552.024 of the Government Code. The university must withhold the information we have marked under section 552.130 and may withhold the social security numbers we have marked under section 552.147 of the Government Code. The remaining information must be released to the requestor.

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), ©. 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).

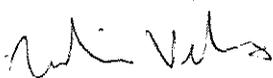
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jb

Ref: ID# 280097

Enc. Submitted documents

c: Ms. Ericka Mellon
Reporter
Houston Chronicle
801 Texas Avenue
Houston, Texas 77002
(w/o enclosures)