



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2007

Mr. Ron G. McFarlane, Jr.
Dealey, Zimmerman, Clark, Malouf & MacFarlane, P.C.
3131 Turtle Creek Boulevard, Suite 1201
Dallas, Texas 75219-5415

OR2007-09384

Dear Mr. McFarlane:

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# 285165.

The City of Cedar Hill (the "city"), which you represent, received a request for the "disciplinary files, application for employment, letter of termination/resignation of [a named] former police employee . . . and letters or documents stating any reason for such termination." You state that the city has released a portion of the requested information.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.119, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. Section 611.002(a) of the Health and Safety Code 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.

¹You inform us, and provide documentation showing, that the city sought clarification of the request from the requestor. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); Open Records Decision No. 633 at 5 (1999) (ten business-day deadline tolled while governmental body awaits clarification).

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. Thus, the city may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

A portion of the information submitted by the city consists of medical records, access to which is governed by the Medical Practices Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 552.101 encompasses the MPA. 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; *Open Records Decision No. 598 (1991)*. 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 may only be released in accordance with the MPA. *See Open Records Decision No. 598 (1991)*. Upon review, the city may only release the medical record we have marked in accordance with the MPA.

Section 552.101 also encompasses section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

- (a) The [Texas Commission on Law Enforcement Officer Standards and Education] 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). The L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms we have marked are confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

The submitted information contains an F-5 form (Report of Separation of License Holder), which is made confidential 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.” *Id.* § 1701.454(a). The city must withhold the F-5 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
 - (4) another polygraph examiner in private consultation; or
 - (5) any other person required by due process of law.
- (b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
- (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. You state that the requestor does not fall into any of the categories of individuals authorized to receive the submitted polygraph information. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

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* ORD 565. 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. We have marked the information that constitutes CHRI generated by TCIC and NCIC and is confidential under section 411.083. Therefore, the information we have marked must be withheld under section 552.101 of the Government Code.

Common-law privacy is also encompassed by section 552.101. 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).

This office has recognized that public employees may have a privacy interest in their drug test results. See Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (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). You assert that the drug test results of the former officer are confidential; however, we conclude that there is a legitimate public interest in this information. Accordingly, the city may not withhold this information under section 552.101 in conjunction with common-law privacy.

In addition, prior decisions of this office have found that personal 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 ORD 545. 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 ORD 600 at 10. The city must withhold the personal financial information we have marked pursuant to section 552.101 in conjunction with common-law privacy.

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). In this case, the individual at issue is no longer employed as an officer by the Cedar Hill Police Department (the "department"). If the named individual remains a licensed peace officer as defined by article 2.12, the city must withhold the personal information you have marked in addition to the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the named former officer is no longer a peace officer, then her personal information may be excepted under section 552.117(a)(1) of the Government Code. 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 city may only withhold information under section 552.117(a)(1) if the former officer elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former officer timely elected, the city must withhold the marked personal information regardless of whether she is still a peace officer. The city may not withhold this information under section 552.117(a)(1), however, if the former officer did not make a timely election to keep the information confidential.

If section 552.117 is inapplicable, 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. Gov't Code § 552.147. The marked social security number may be withheld under section 552.147 of the Government Code.

You claim that a photograph of the named officer in the submitted information is excepted from public disclosure under section 552.119 of the Government Code. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Id. § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. In this instance, you have not submitted any arguments explaining how release of the picture at issue would endanger the life or physical safety of the officer depicted. We therefore determine that the city may not withhold this picture under section 552.119 of the Government Code.

You also claim section 552.130 of the Government Code. Section 552.130 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. . . .” *Id.* § 552.130(a). Therefore, pursuant to section 552.130, the city must withhold the Texas-issued motor vehicle and driver’s license information we have marked.

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.

Id. § 552.136.² The city must withhold the insurance policy number we have marked pursuant to section 552.136.

In summary, the city must withhold the following items pursuant to section 552.101 of the Government Code: the L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms in conjunction with section 1701.306 of the

²The 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).

Occupations Code; the F-5 form (Report of Separation of License Holder) in conjunction with section 1701.454 of the Occupations Code; the polygraph information in conjunction with section 1703.306 of the Occupations Code; and the marked CHRI in conjunction with section 411.083 of the Government Code. The city also must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The city must withhold the marked medical record in accordance with the MPA and the mental health records we have marked in accordance with section 611.002 of the Health and Safety Code. If the named individual at issue remains a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the personal information you have marked in addition to the information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the named former officer is no longer a peace officer, then the city must withhold the marked personal information under section 552.117(a)(1) of the Government Code, if the former officer timely elected under section 552.024 of the Government Code. The city also must withhold the Texas issued motor vehicle record and driver's license information we marked under section 552.130 and the insurance policy number we have marked under section 552.136. Finally, the city may withhold the marked social security number under section 552.147, if section 552.117 is inapplicable. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

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

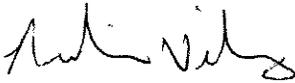
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *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# 285165

Enc. Submitted documents

c: Mr. Harold Cornish
601 Nora Lane
DeSoto, Texas 75115
(w/o enclosures)