ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 11, 2007

Mr. Charles R. Kimbrough
Bickerstaff, Heath, Delgado, & Acosta, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2007-16318

Dear Mr. Kimbrough:

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# 296961.

The City of Bee Cave (the "city"), which you represent, received a request for any letters, reports, memorandum, or documents pertaining to the income, performance evaluations, complaints filed, and investigations conducted regarding a specified police officer. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the officer whose information is at issue. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information contains the specified officer's L-2 (Declaration of Medical Condition) and L-3 (Declaration of Psychological and Emotional Health) forms, which are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission"). 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. This section encompasses information made confidential by other statutes. Section 1701.306 of the Occupations Code 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). These declarations, which 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.

We next note that 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, which 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 therefore 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 information protected by common-law privacy, which you claim is applicable to some of the remaining submitted information. You also claim that some 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(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (*citing Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Accordingly, we will consider your common-law privacy claim under both sections 552.101 and 552.102.

Common-law privacy protects information if (1) the information contains highly intimate and embarrassing facts, the publication 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 668 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. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Upon review, we conclude that some of the submitted information is protected by common-law privacy. Accordingly, we have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

This office has also 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 (*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 officer at issue are confidential; however, we conclude that there is a legitimate public interest in this information. Upon review, we find that no portion of the remaining information is subject to common-law privacy. Accordingly, none of the remaining information may be withheld under section 552.102 or section 522.101 in conjunction with common-law privacy.

You also claim that a portion of the remaining submitted information is subject to sections 611.001 through 611.008 of the Texas Health and Safety Code. Section 552.101 of the Government Code also encompasses chapter 611 of the Texas Health and Safety Code, which specifically addresses the public availability of mental health records. Section 611.002 of the Health & Safety Code provides in pertinent part:

> (a) 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.
>
> (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Under section 611.001, a "professional" is (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. Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to mental health records only by certain individuals. *See id.* §§ 611.004 , 611.0045; Open Records Decision No. 565 (1990). In this instance, we find that the city has failed to demonstrate how any portion of the remaining information constitutes a mental health record subject to chapter 611 of the Health and Safety Code. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

You further assert that some of the remaining submitted information is confidential under sections 159.001 through 159.005 of the Texas Occupations Code. Access to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 552.101 of the Government Code also encompasses section 159.002 of the MPA, which 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. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* Upon review, we find that the city has failed to demonstrate how any portion of the remaining information constitutes a medical record for purposes of the MPA. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Next, you claim that a portion of the remaining submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, 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 of the Government Code. *See* Gov't Code § 552.117(a)(2). Therefore, the city must withhold the information we have marked under section 552.117(a)(2).

Finally, we note that some of the submitted information is subject to section 552.136 of the Government Code.[1] Section 552.136(b) provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." The city must therefore withhold the account number we have marked under section 552.136 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the city must withhold the marked L-2 and L-3 forms under section 1701.306 of the Occupations Code, the marked F-5 form under section 1701.454 of the Occupations Code, and the information we have marked under common-law privacy. The city must also withhold the information we have marked under section 552.117(a)(2), as well as the account number we have marked under section 552.136. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

---

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

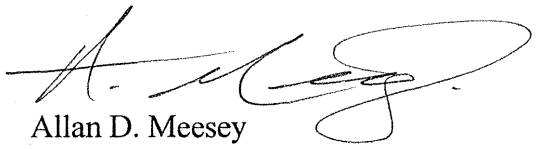
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 296961

Enc. Submitted documents

c: Ms. Christina Phelps
Zunker, Crane & Gibson, L.L.P.
700 Lavaca Street, Suite 1010
Austin, Texas 78701
(w/o enclosures)

Ms. Stephanie Campbell
7608 White Oak Drive
Lago Vista, Texas 78645
(w/o enclosures)