



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2007

Mr. George E. Hyde
Denton, Navarro, Rocha & Bernal, P.C.
2517 North Main Avenue
San Antonio, Texas 78212

OR2007-16791

Dear Mr. Hyde:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 298075.

The Bandera County Sheriff's Office (the "sheriff"), which you represent, received a request for the personnel records of a specific deputy sheriff. You claim that portions of the submitted documents are excepted from disclosure under sections 552.101, 552.111, 552.115, 552.117, 552.130, 552.140, and 552.147 of the Government Code.¹ We have considered your claimed exceptions to disclosure and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments to explain why requested information should or should not be released).

Initially, we address the requestor's argument that the sheriff did not fully comply with section 552.301(e-1) of the Government Code. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written

¹Although you raise section 552.1175 of the Government Code, the correct exception to raise for information pertaining to an employee of the governmental body is section 552.117.

comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). Although the sheriff sent the requestor a copy of its written comments as required by section 552.301(e)(1)(A), the sheriff redacted most of its discussion of the asserted exceptions. The redacted information does not disclose or contain the substance of the information requested; therefore, we conclude that the sheriff failed to comply with the requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). 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). Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to Gov't Code § 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the sheriff waived its claims under section 552.111. As mandatory exceptions, however, sections 552.101, 552.115, 552.117, 552.130 and 552.140 can provide compelling reasons to withhold the submitted information. Accordingly, we will consider your arguments under these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. *See* Gov't Code § 552.101. Section 1701.452 of the Occupations Code requires that a law enforcement agency submit a report to the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") regarding an officer licensed under chapter 1701 who resigns or is terminated by a law enforcement agency. *See* Occ. Code § 1701.452. Section 1701.454 makes such reports, which are commonly referred to as "F-5's," confidential and provides in relevant part:

- 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 instances of excessive force or violations of the law other than traffic offenses.*

Id. § 1701.454(a) (emphasis added). You assert that the submitted F-5 and L-1 forms are confidential under section 1701.454. The L-1, Report of Appointment/License Application, however, is not a report submitted to the commission pertaining to an officer's resignation or termination. Thus, the L-1 form is not confidential under section 1701.454. Furthermore, a review of the F-5 reveals that the deputy in question was terminated for violations of law other than traffic offenses. Accordingly, the F-5 is also not confidential under section 1701.454 of the Occupations Code.

Next, we note that the documents contain criminal history record information ("CHRI"), which is also encompassed by section 552.101. CHRI that is generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. 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. 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 note, however, that the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See id.* § 411.082(2)(B). We have marked the CHRI that must be withheld under section 552.101 of the Government Code in conjunction with section 411.083.

The submitted documents also contain fingerprint information the release of which is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code § § 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). It does not appear that section 560.002 permits the release of the deputy's fingerprints in this instance. Accordingly, the sheriff must withhold the deputy's fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public

interest in its disclosure. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is 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). Common-law privacy does not, however, protect all medically-related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). Upon review, we have marked the deputy's medical information for which there is no legitimate public interest in its disclosure.

Next you claim that a vital statistics record maintained in the deputy's personnel file is excepted from public disclosure under section 552.115 of the Government Code. This exception only protects, for a specific time period, birth or death records maintained by the Bureau of Vital Statistics of the Texas Department of State Health Services or a local registration official. *See id.* § 552.115; Open Records Decision No. 338 (1982) (stating that had legislature intended to except all vital statistics information, wherever maintained, it would not have appended to predecessor to Gov't Code § 552.115 the clause "maintained by Bureau of Vital Statistics"). As you acknowledge, the submitted document is maintained by the sheriff. Thus, section 552.115 does not apply to this record.

You claim that some of the submitted information is excepted under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) also encompasses the personal cellular telephone number and pager number of a peace officer. *See* Open Records Decision No. 670 (2001). We have marked the personal information of the deputy that must be withheld under section 552.117(a)(2).²

Next you assert that some of the information is excepted under section 552.130 of the Government Code, which excepts 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(a)(1), (2). We have marked the deputy's Texas driver's license and driver's license information that the sheriff must withhold from disclosure under section 552.130.

We note that the documents contain the deputy's personal e-mail address. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the

²Because we are able to make a determination under section 552.117, we need not address your arguments under section 552.147.

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 id.* § 552.137(a)-(c). The e-mail address is not of a type specifically excluded by section 552.137(c). Consequently, unless the deputy has consented to its release, the sheriff must withhold the marked e-mail address from disclosure under section 552.137.

Finally, we address your argument that the submitted DD-214 forms are confidential under section 552.140. Section 552.140 of the Government Code provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). Although you do not inform us when the sheriff came into possession of the submitted DD-214 forms, based on our review, the forms came into the possession of the sheriff on or after September 1, 2003. Thus, the sheriff must withhold these forms in their entirety under section 552.140 of the Government Code.

In summary, we have marked the information that must be withheld under sections 552.101, 552.117(a)(2), 552.130, and 552.137. The submitted DD-214 forms must be withheld in their entirety under section 552.140 of the Government Code. 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 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

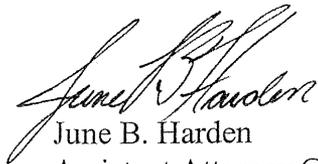
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/jh

Ref: ID# 298075

Enc: Submitted documents

c: Mr. J. Gary Trichter
Trichter & Murphy, P.C.
200 Smith Street
Houston, Texas 77002
(w/o enclosures)