



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 3, 2008

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90321
Arlington, Texas 76004-3231

OR2008-07545

Dear Ms. Shortall:

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# 311647.

The Arlington Police Department (the "department") received a request for a named former police officer's personnel file. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that a portion of the submitted information is not responsive to the instant request, because it does not pertain to the named officer. This decision does not address the public availability of the non-responsive information, which we have marked, and it need not be released.

Next, we note that the submitted information contains ST-3 accident report forms that were completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision,

the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The requestor has not provided the department with two of the three pieces of information for any of the reports; thus, the department must withhold the submitted accident reports under section 550.065(b) of the Transportation Code.

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 exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the submitted Form I-9 would be "for purposes other than for enforcement" of the applicable federal law. A Form I-9 may only be released for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the department must withhold the marked Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that this section renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 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). Thus, the submitted W-4 form constitutes tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

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.

Occ. Code § 1703.306. The remaining information contains information acquired from polygraph examinations. It does not appear that the requestor falls into any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we conclude that the department must withhold the information acquired from a polygraph examination that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Next, we note that the remaining information contains fingerprint information that is governed by chapter 560 of the Government Code, which is also encompassed by section 552.101 of the Government Code. Chapter 560 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). Accordingly, the department must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

The remaining information also contains an L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") that are subject to section 1701.306 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Chapter 1701 of the Occupations Code is applicable to TCLEOSE. Specifically, section 1701.306 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). Therefore, the department must withhold the submitted L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

The remaining information also includes an F-5 form, Report of Resignation or Separation of License Holder, which is also a TCLEOSE report encompassed by section 552.101 of the Government Code. Section 1701.454 of the Occupations Code 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). Accordingly, the department must withhold the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

We note the remaining information also contains medical records. Access to medical records is governed by the Medical Practice Act (the “MPA”), *Id.* §§ 151.001-165.160, and is also encompassed by section 552.101 of the Government 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.

Id. § 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.* Accordingly, the medical records we have marked may be released only in accordance with the MPA.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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 required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include 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), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find that the personal account balances, financial history, optional insurance coverage, optional financial investment, beneficiary designation,

and deferred compensation information, which we have marked, in the remaining information constitutes personal financial information. We also find that this information is not of legitimate public concern. Thus, the department must withhold this personal financial information along with the additional information we have marked under common-law privacy.

You also seek to withhold under common-law privacy portions of the personnel records that pertain to the named officer's criminal history. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, this office has also 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). In this instance, the information you seek to withhold pertains to a former police officer, not a private citizen. Because the officer's compiled criminal history information appears to have been gathered in the course of his pre employment screening, there is a legitimate public interest in this information. Accordingly, the doctrine of common-law privacy is not applicable in this instance, and the information may not be withheld on this basis.

We note that some of the remaining information may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 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. In this instance, we are unable to determine from the information provided whether the former officer at issue is still a licensed peace officer. Thus, we must rule conditionally. Accordingly, if the former officer at issue is still a licensed peace officer, then the department must withhold the information we have marked under section 552.117(a)(2).

¹We note that you raised section 552.1175 of the Government Code. However, because the former officer at issue was an employee of the department, the proper exception is section 552.117.

With respect to section 552.117(a)(1), the submitted information reflects that the former officer elected to keep only his home address and telephone number confidential pursuant to section 552.024 of the Government Code prior to the department receiving the request at issue. Therefore, if the former officer is not a licensed peace officer, you must still withhold the home address and telephone number we have marked under section 552.117(a)(1). However, because the officer did not elect to keep his social security number and family member information confidential, you may not withhold this information, which we have marked in case section 552.117(a)(2) applies, under section 552.117(a)(1).²

Next, we note that section 552.1175 of the Government Code may apply to a portion of the remaining information. Section 552.1175 provides in part the following:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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(b). We note that section 552.1175 also encompasses a personal cellular telephone number, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). The remaining information includes a Dallas Area Rapid Transit ("DART") police officer's cellular telephone number. You do not inform this office, nor does any of the submitted information indicate, whether the DART officer at issue has elected yet to keep this information confidential in accordance with subsections 552.1175(b)(1) and (2). Accordingly, if the cellular telephone service is not paid for by a governmental body and if the DART officer elects to restrict access to this information in accordance with section 552.1175(b), then the department must withhold the officer's cellular telephone number that we have marked under section 552.1175. If no elections are made, the department must release the DART officer's cellular telephone number.

²We note that 552.147(b) of the Government Code authorizes the department to redact the remaining social security numbers from public release without the necessity of requesting a decision from this office under the Act.

We note that a portion of the remaining information consists of Texas motor vehicle record information that is confidential under section 552.130 of the Government Code. Section 552.130 provides:

(a) Information is excepted from required public disclosure if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state [.]

Gov't Code § 552.130(a)(1), (2). The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We note that the remaining information contains bank account and credit card account numbers. Section 552.136 states 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." *Id.* § 552.136(b). The department must withhold the bank account and credit card numbers marked under section 552.136 of the Government Code.

The remaining information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137 (b). You do not inform us that the owners of the e-mail addresses have affirmatively consented to release of their e-mail addresses. Therefore, unless the department receives consent to release the marked e-mail addresses, the department must withhold them under section 552.137.

In summary, the department must withhold the submitted ST-3 accident reports under section 550.065(b) of the Transportation Code. You must withhold the following information under section 552.101: 1) the I-9 we have marked in conjunction with section 1324a of title 8 of the United States Code, 2) the W-4 we have marked in conjunction with federal law, 3) the polygraph information we have marked in conjunction with section 1703.306 of the Occupations Code, 4) the biometric information we have marked in conjunction with section 560.003 of the Government Code, 5) the L-2 and L-3 forms marked in conjunction with section 1701.306 of the Occupations Code, 6) the F-5 form marked in conjunction with section 1701.454 of the Occupations Code, and 7) the information we have marked under common-law privacy. You may only release the marked medical records we have marked in accordance with the MPA. If the former officer at issue is still a licensed

peace officer, then the department must withhold the information we have marked under section 552.117(a)(2). If the former officer is not a licensed police officer, then you must withhold only the marked home addresses and home telephone numbers under section 552.117(a)(1). If the cellular telephone service is not paid for by a governmental body and if the DART officer elects to restrict access to this information in accordance with section 552.1175(b), then department must withhold the DART officer's cellular telephone number we have marked under section 552.1175. If no elections are made, then the department must release the DART officer's cellular telephone number. You must withhold the Texas motor vehicle record information we have marked under section 552.130. You must withhold the account numbers we have marked under section 552.136. Unless the department receives consent to release, you must withhold the e-mail addresses that we have marked under section 552.137. 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).

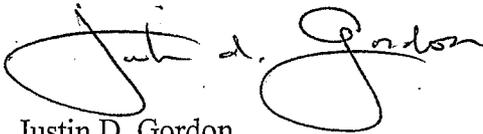
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with the first name "Justin" and last name "Gordon" clearly legible.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 311647

Enc. Submitted documents

c: Mr. Barry G. Johnson
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