



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2008

Mr. Jeff Ulmann  
Knight & Partners  
Executive Office Terrace  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2008-17123

Dear Mr. Ulmann:

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# 330169.

The City of Lago Vista Police Department (the "department"), which you represent, received a request for personnel information of a named officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.114, 552.115, 552.117, 552.119, 552.130, 552.136, and 552.140 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information, portions of which are representative samples.<sup>2</sup>

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy

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<sup>1</sup>Although you initially raised section 552.102(a) of the Government Code as an exception to the disclosure of some of the submitted information, you have provided no arguments regarding the applicability of this section. Thus, we assume that you no longer urge this section. *See* Gov't Code §§ 552.301(b), (e), .302. Further, although you raise section 552.1175 of the Government Code for some of the submitted information, we note that section 552.117(a)(2) of the Government Code is the applicable exception for that type of information.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Act ("FERPA"), 20 U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records. Accordingly, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address the applicability of the other claimed exceptions to the submitted information.

We next address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The department received the request for information on September 24, 2008. Although you timely raised sections 552.101, 552.115, 552.119, and 552.130 of the Government Code, you did not raise sections 552.117, 552.136, and 552.140 until October 15, 2008. Thus, with respect to sections 552.117, 552.136, and 552.140, the department failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). However, because the applicability of sections 552.117, 552.136, and 552.140 can provide compelling reasons to withhold information, and because you have timely raised sections 552.101, 552.115, 552.119, and 552.130, we will consider your arguments under these sections. *See* Gov't Code § 552.302, *see also* Open Records Decision No. 150 at 2 (1977).

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 552.101 encompasses section 1324a of title 8 of the United States Code, which 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). Release of the submitted I-9 form under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the I-9 form we have marked in Exhibit G is confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. The submitted information includes W-4 and tax levy forms. We note that the department received the tax levy forms from the IRS. Prior decisions of this office have held that section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). The term "return information" includes "tax liability . . . prepared by . . . or collected by the Secretary with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax[.]" *See id.* § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the IRS regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Therefore, we conclude that information pertaining to a tax levy constitutes "tax return information" as contemplated by section 6103(a) of title 26 of the United States Code. *See Johnson v. Sawyer*, 120 F.3d 1307, 1330 (5th Cir. 1997) (tax return information is confidential unless disclosure is permitted by exception found in section 6103) (citing *Chandler v. United States*, 687 F. Supp. 1515, 1516 n.1 (C.D. Utah 1988), *aff'd*, 887 F.2d 1397 (10th Cir. 1989) (notice of levy disclosed tax return information)). Accordingly, the department must withhold the submitted W-4 and tax levy forms in Exhibit I pursuant to federal law.

Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent part:

(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(b), (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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). Medical records may only be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). The department may only disclose the medical records we have marked in accordance with the MPA.<sup>3</sup>

The submitted information also contains fingerprint information. 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), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The department does not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the department must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses section 411.192 of the Government Code, which governs the release of all information maintained by the Texas Department of Public Safety ("DPS") concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining claim for these records.

[DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

Gov't Code § 411.192. The submitted documents contain information concerning the officer's concealed handgun license. In this instance, the circumstances of the request do not meet the access requirements of section 411.192. Therefore, the department must withhold this information, which we have marked, pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

The department also claims that some of the information at issue is confidential under section 552.101 in conjunction with section 402.092 of the Labor Code. Section 402.092 of the Labor Code provides confidentiality and exceptions to confidentiality for the investigation files of the Division of Workers' Compensation of the Texas Department of Insurance (the "division"). Section 402.092 provides in relevant part:

(a) In this section, "investigation file" means any information compiled or maintained by the division with respect to a division investigation under this subtitle or other workers' compensation law.[]

(b) Information maintained in the investigation files of the division is confidential and may not be disclosed except [in five specified situations].

Labor Code § 402.092(a)-(b). You do not indicate, and it does not otherwise appear to this office, that any of the information that the department seeks to withhold is maintained in the division's investigation files. Therefore, none of the information at issue is confidential under section 402.092 of the Labor Code, and the department may not withhold any of the information on that basis under section 552.101.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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 found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing. *See* Open Records Decision Nos. 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, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). But 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 is confidential under common-law privacy. Therefore, the department must withhold this information under section 552.101. But the remaining information either is not highly intimate or embarrassing, or it is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and the department may not withhold it under section 552.101 on that ground.<sup>4</sup>

We now turn to your argument that section 552.115 of the Government Code excepts from disclosure Exhibit E, which consists of the birth certificate of the named officer. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that a "birth record is public information and available to the public on and after the 75<sup>th</sup> anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Gov't Code § 552.115(a)(1). Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or a local registration official, the department may not withhold the submitted birth certificate pursuant to that section. *See* Open Records Decision No.338 (1982).

You assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). We note that section 552.117(a)(2) encompasses a peace officer's personal cell telephone and pager numbers if the officer personally pays for the cell or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1988) (Gov't

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<sup>4</sup>As we are able to make this determination, we do not address your claim under section 552.136 of the Government Code for this information.

Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). We further note that section 552.117 (a)(2) is not applicable to a former spouse or the fact that a peace officer has been divorced. The department must withhold the information we have marked under section 552.117(a)(2).

Section 552.119 of the Government Code provides the following:

(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.

Gov't Code § 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. After review of your arguments, we find you have not demonstrated, and it is not apparent from our review of the submitted information, that release of the photographs at issue would endanger the life or physical safety of the peace officer depicted; therefore the department may not withhold the photographs of the officer pursuant to section 552.119 of the Government Code.

You also raise section 552.130 of the Government Code. This section 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." Gov't Code § 552.130(a)(1). The department must withhold the information we have marked under section 552.130.

The remaining submitted information contains an insurance policy number. Section 552.136 of the Government Code 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." Gov't Code § 552.136. Accordingly, the department must withhold the insurance policy number we have marked under section 552.136.

Finally, you assert that the submitted DD-214 forms in Exhibit H are excepted under section 552.140 of the Government Code. Section 552.140 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* Gov't Code § 552.140(a), (b). Because you do not inform us when the DD-214 forms came into the department's possession, the department must withhold the DD-214 forms under section 552.140 if they came into the possession of the department on or after September 1, 2003. If these forms were received by the department before September 1, 2003, then the department may not withhold them pursuant to section 552.140.

In summary, this ruling does not address the applicability of section 552.114 of the Government Code or FERPA to the submitted information. The department may only disclose the medical records we have marked in accordance with the MPA. Under section 552.101 of the Government Code, the department must withhold (1) the I-9 form in conjunction with section 1324a of title 8 of the United States Code; (2) the W-4 and tax levy forms in conjunction with section 6103(a) of title 26 of the United States Code; (3) the fingerprint we have marked in conjunction with section 560.003 of the Government Code; (4) the information we have marked pertaining to the officer's concealed handgun license in conjunction with section 411.192 of the Government Code; and (5) the information we have marked in conjunction with common-law privacy. The department must also withhold (1) the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code; (2) the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; (3) the insurance policy number we have marked under section 552.136 of the Government Code; and (4) the DD-214 forms in Exhibit H under section 552.140 of the Government Code if they came into the possession of the department on or after September 1, 2003. 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 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). If the governmental body does not file suit over 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/eb

Ref: ID# 330169

Enc. Submitted documents

c: Requestor  
(w/o enclosures)