



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2009

Mr. Leonard V. Schneider
Ross, Banks, May, Cron & Calvin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2009-05499

Dear Mr. Schneider:

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# 341011.

The Magnolia Police Department (the "department"), which you represent, received a request for fourteen categories of information pertaining to a named officer. You state that you will release some of the information to the requestor. You also state that you have redacted personal information of peace officers pursuant to the previous determination issued by this office in Open Records Decision No. 670 (2001).¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, 552.130, 552.136, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

You assert that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The submitted information contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes

¹See Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without the necessity of requesting attorney general decision under section 552.117(a)(2); see also Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301).

²Although you raise section 552.1175 of the Government Code, we note that section 552.117 is the proper exception to claim for information relating to a former employee of the department.

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 form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 forms, which we have marked, are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of income.” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service 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), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the department must withhold the submitted W-4 forms, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

We note that a portion of the submitted information relates to a sex offender who is subject to registration under chapter 62 of the Code of Criminal Procedure. Article 62.051 of the Code of Criminal Procedure requires a sex offender registrant to provide the following information for the Department of Public Safety (“DPS”) sex offender registration database: the person’s full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver’s license number; shoe size; home address; a recent color photograph, or if possible, an electronic image of the person; a complete set of fingerprints; the type of offense the person was convicted of; the age of the victim; the date of conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; an indication of each license, as defined by article 62.005(g), that is held or sought by the person; an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and any other information required by DPS. *See* Crim. Proc. Code art. 62.051(c). This information is public information with the exception of the person’s social security number, driver’s license number, telephone number, all information required by DPS outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See id.* art. 62.005(b). We have marked information subject to article 62.005, and the department must withhold or release this information in accordance with article 62.005(b).

Section 552.101 also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. 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 CHRI it generates. *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, but 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.* §§ 411.090-411.127. 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.* Therefore, any CHRI obtained from DPS or any other criminal justice agency in the information at issue must be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. Upon review, we agree that a portion of the remaining information, which we have marked, consists of CHRI, and must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, none of the remaining information you have marked consists of CHRI, and it may not be withheld on this basis.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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). 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 conclude none of the information at issue consists of medical records that are subject to the MPA, and the department may not withhold any of the remaining information on this basis.

You also assert that the remaining information contains declaration forms that are confidential under section 1701.306 of the Occupations Code. Section 1701.306 provides in relevant part 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). Although you maintain that the L-1 Report of Appointment/License Application is excepted from disclosure pursuant to section 1701.306, we note that L-1 forms are not made confidential by section 1701.306 and therefore may not be withheld under section 552.101 on that basis. Further, we find the information at issue does not contain any L-2 or L-3 forms; therefore, section 1701.306 of the Occupations Code is inapplicable and the department may not withhold this information under section 552.101 on that basis.

You generally assert that portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with section 855.115 of the Government Code, which protects “[i]nformation contained in records that are in the custody of the [Texas Municipal Retirement System.]” In this instance, the submitted information is held by the department rather than the Texas Municipal Retirement System. Therefore, we find that the none of the remaining information is confidential under section 855.115 of the Government Code, and thus it may not be withheld on that basis under section 552.101.

You also generally assert that portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with section 12.003 of the Human Resources Code. Federal and state statutes prohibit the disclosure of information concerning a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* 42 U.S.C. § 1396a(a)(7); Hum. Res. Code §§ 12.003, 21.012; Open Records Decision Nos. 584 (1991), 166 (1977). In this instance, we find that none of the remaining information contains information pertaining to a state plan for medical assistance. Therefore, we find that none of the remaining information is confidential under section 12.003 of the Human Resources Code, and thus it may not be withheld on that basis under section 552.101.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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 established. *Id.* at 681-82. The types 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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 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). The remaining information includes personal financial information. We find this information, which we have marked, is not of legitimate public concern. Thus, the department must withhold the personal financial information, along with the additional information we have marked, 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. Thus, 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 552.101 in conjunction with common-law privacy.

You assert that some of the remaining information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses, 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). The department must withhold the information we have marked under section 552.117(a)(2). However, none of the remaining information consists of the home address, telephone number, social security number, or family member information of a peace officer. Thus, section 552.117 is not applicable to any of the remaining information you have marked, and it may not be withheld on that basis.

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. 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. However, no portion of the remaining information you have marked consists of Texas motor vehicle record information. Thus, section 552.130 is not applicable to any of the remaining information you have marked, and it may not be withheld on that basis.

You assert that some of the remaining information is excepted under section 552.136 of the Government Code. 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 department must withhold the account number and routing number we have marked under section 552.136.

Finally, you state that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. The department may withhold the social security numbers in the submitted information under section 552.147.³

In summary, the department must withhold the I-9 forms we have marked subject to federal laws and regulations governing the employment verification system under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. The department must withhold the submitted W-4 forms we have marked pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The department must release or withhold the sexual offender registry information we have marked in accordance with article 62.005(b) of the Code of Criminal Procedure. The department must withhold the information we have marked as CHRI under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(2). The department must withhold the Texas motor vehicle record

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

information we have marked under section 552.130. The department must withhold the account numbers and routing numbers we have marked under section 552.136. Finally, the department may withhold the social security numbers marked under section 552.147. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/jb

Ref: ID# 341011

Enc. Submitted documents

c: Requestor
(w/o enclosures)