



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2009

Ms. Jerris Penrod Mapes
Assistant City Attorney
Killeen Police Department
402 North Second Street
Killeen, Texas 76541-5298

OR2009-14134

Dear Ms. Mapes:

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# 357585 (Killeen Request #: W001902).

The City of Killeen (the "city") received a request for all personnel records for a named city police officer. You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 that other statutes make confidential, such as section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. ~~See Local Gov't Code § 143.089(a), (g).~~ The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following

types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that Attachment C is contained in the city police department's internal file for the named officer and that this information is maintained under section 143.089(g). Therefore, we agree that Attachment C is confidential under section 143.089(g) of the Local Government Code and must be withheld from disclosure under section 552.101 of the Government Code.

The Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, is also encompassed by section 552.101. Section 159.002 of the MPA provides in part the following:

(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(a)-(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). Upon review, we agree that some of the information in Attachment E, which we have marked, constitutes medical records that are subject to the MPA. However, you have failed to demonstrate how any of the remaining information in Attachment E constitutes a communication between a physician and a patient or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, the city must withhold only the medical records we have marked under the MPA.

We note that a portion of the remaining information is subject to the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA . . . is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Some of the remaining information, which we have marked, consists of a medical certification provided to the city for FMLA purposes. Thus, this information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to these records. Thus, we conclude that the city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

We note that some of the remaining information is subject to section 611.002 of the Health and Safety Code. Section 552.101 also encompasses section 611.002, which is applicable to mental health records and 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); *see id.* § 611.001 (defining “patient” and “professional”). Upon review, we find the information we have marked consists of mental health records. Accordingly, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code. Under section 1701.306, L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) are confidential. Section 1701.306 provides:

(a) [TCLEOSE] 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 [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Upon review, we find the city must withhold the submitted L-2 and L-3 declarations, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

We note the remaining information includes a W-4 form, which is excepted from disclosure under section 6103(a) of title 26 of the United States Code. Section 552.101 of the Government Code also encompasses section 6103(a). 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). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, 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 with respect to 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). 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 city must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 411.083 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. 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 deems confidential CHRI that the Texas 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). The information that we have marked is confidential under chapter 411 and must be withheld under section 552.101 of the Government Code.

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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found that 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). Further, we have 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 (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). However, there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (public has legitimate interest in job performance of public employees), 444 (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).

Upon review, we find that portions of the submitted information, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Thus, the city must withhold this information under section 552.101 on the basis of common-law privacy. However, you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing or not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

You claim that some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested

confidentiality under section 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). We note that section 552.117 also encompasses personal cellular telephone numbers, 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 phone numbers paid for by governmental body and intended for official use). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the city must only withhold the cellular telephone numbers we have marked under section 552.117(a)(2) if the officer at issue paid for the cellular telephone with her own funds.

Section 552.130 of the Government Code 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 [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a).¹ Accordingly, the city must withhold the Texas motor vehicle record information we have marked under section 552.130. As our ruling regarding this information is dispositive, we need not address your argument to withhold this information from disclosure under section 521.051 of the Transportation Code.

The remaining information also contains DD-214 military discharge forms. 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 be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a), (b). You do not inform us when the city came into possession of the submitted DD-214 forms. Therefore, if the submitted DD-214 forms came into the possession of the city on or after September 1, 2003, the city must withhold these forms in their entirety under section 552.140. Conversely, if the city received the forms before September 1, 2003, the city may not withhold the forms pursuant to section 552.140.

In summary, the city must withhold Attachment C under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. In conjunction with section 552.101 of the Government Code, the city must also withhold: (1) the medical records we have marked under the MPA; (2) the information we have marked pursuant to the FMLA; (3) the information we have marked under section 611.002(a) of the Health and Safety Code; (4) the submitted L-2 and L-3 declarations under section 1701.306 of the Occupations Code; (5) the submitted W-4 form pursuant to section 6103(a) of title 26 of the United States Code; (6) the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; and (7) the information we have marked on the basis of common-law privacy. ~~The city must withhold the information~~

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

we have marked under section 552.117(a)(2) of the Government Code. However, the city must only withhold the cellular telephone numbers we have marked under section 552.117(a)(2) if the officer at issue paid for the cellular telephone with her own funds. The city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the submitted DD-214 forms under section 552.140 of the Government Code, to the extent they came into the possession of the city on or after September 1, 2003. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/eeg

Ref: ID# 357585

Enc. Submitted documents

cc: Requestor
(w/o enclosures)