ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2009

Mr. Christopher B. Gilbert
Thompson & Horton LLP
711 Louisiana Street, Suite 2100
Houston, Texas 77002-2746

OR2009-14359

Dear Mr. Gilbert:

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# 358324.

The Katy Independent School District Police Department (the "department"), which you represent, received a request for information pertaining to two named officers of the department. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.122, 552.130, 552.136 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention the department failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *Id.* § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The department states, and the submitted documents reflect, that the department received this request for information on July 17, 2009. The department states it was closed for business on July 17, 2009, July 24, 2009, and again on July 31, 2009. The requestor argues these closures were not "legal holidays," and thus

should be counted towards the ten-business-day deadline. We note this office does not count the date the request was received, holidays, or days a governmental body was closed for business as business days for the purpose of calculating a governmental body's deadlines under section 552.301. Accordingly, the tenth business day after the receipt of the instant request was August 5, 2009. Consequently, because the department requested a ruling from this office on August 4, 2009, we find the department complied with its ten-business-day deadline under section 552.301(b).

Next, we note, and you acknowledge, the department has redacted portions of the submitted information. The previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) without the necessity of requesting a decision from this office. *See* Open Records Decision No. 670 at 6. We note, however, the department has redacted a peace officer's work phone number, which is beyond the information that is encompassed by section 552.117(a)(2). You do not assert, nor does our review of our records indicate, that the department has been authorized to withhold such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of this information, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), .302.

Next, we address your claim under section 552.103 of the Government Code, as it is potentially the most encompassing of your claimed exceptions to disclosure. Section 552.103 provides in part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> ...
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

> on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act, chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982).

You state the submitted information relates to a pending criminal prosecution. We note, however, the department is not a party to this prosecution. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided such a representation. Therefore, the department may not withhold the submitted information under section 552.103.

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 chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 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). You seek to withhold the fingerprints in the submitted information under section 560.003. There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless the individual consents to disclosure). Therefore, the department must withhold the fingerprints you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

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 remaining information 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 portions of the remaining information, which we have marked, consist 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 find the information you have marked constitutes medical records that may only be released in accordance with the MPA.[1]

Section 552.101 also encompasses the doctrine of common-law privacy, while section 552.102(a) 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 your common-law privacy claim 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). In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are 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). Upon review, we find the personal financial information you have marked, in addition to the financial and medical information we have marked, constitute highly intimate or embarrassing information of no legitimate public interest. Accordingly, the department must withhold this information under section 552.101 in conjunction with common-law privacy. However, the remaining information you have

[1]As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

marked is either not highly intimate or embarrassing or it is of legitimate public interest. *See* Open Records Decision Nos. 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), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement). Therefore, the department may not withhold any of the remaining information, which we have marked for release, under either section 552.101 or 552.102(a) on the basis of common-law privacy.

You claim the submitted academic transcript is excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) states:

> a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Gov't Code § 552.102(b). However, section 552.102(b) of the Government Code is applicable only to a transcript of a professional public school employee. Thus, section 552.102(b) is not applicable to the submitted transcript of a peace officer and the information at issue may not be withheld under this exception.

We note portions of the remaining information are subject to section 552.117(a)(2) of the Government Code.[2] 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 made an election under section 552.024 of the Government Code to keep such information confidential. *Id.* § 552.117(a)(2). Thus, the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

We further note some of the remaining information may fall under section 552.1175 of the Government Code. Section 552.1175 provides in part:

> (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:

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

> (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.

Id. § 552.1175(b). The submitted information includes the home address and telephone number of a peace officer who is not a department employee. To the extent this individual is a currently licensed peace officer who elected to restrict public access to his personal information, the department must withhold the information we have marked under section 552.1175. To the extent this individual is not a currently licensed peace officer who elected to restrict public access to his personal information, the department may not withhold information pertaining to that individual under section 552.1175.

You assert the submitted interview questions and applicant answers are excepted under section 552.122(b) of the Government Code, which excepts from required public disclosure "a test item developed by a . . . governmental body[.]" *Id.* § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated[,]" but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You assert the submitted interview questions are test items for the purposes of section 552.122. We agree the submitted interview questions are test items. Furthermore, we find release of the applicant's answers reveal the interview questions. We therefore conclude the department may withhold the information you have marked under section 552.122.

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). The department must withhold the Texas driver's license information you have marked and the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The department must withhold the account numbers you have marked under section 552.136.

Finally, you assert the remaining information contains a personal e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). You state the owner of one of the e-mail addresses at issue has not consented to its release. Accordingly, the department must withhold the e-mail address you have marked, in addition to the e-mail address we have marked to the extent its owner has not consented to its release, under section 552.137 of the Government Code.

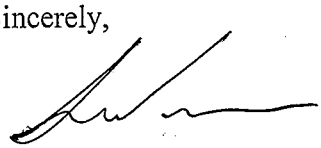
In summary, the department must withhold (1) the submitted fingerprints under section 552.101 in conjunction with 560.003 of the Government Code; (2) the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code; (3) the personal financial information you have marked and the financial and medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the information we have marked under section 552.117(a)(2) of the Government Code; (5) the information we have marked under section 552.1175 of the Government Code, to the extent the individual whose information is at issue is a currently licensed peace officer who elected to restrict public access to his personal information; (6) the information you have marked under section 552.122 of the Government Code; (7) the Texas driver's license information you have marked and the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; (8) the account numbers you have marked under section 552.136 of the Government Code; and (9) the marked e-mail addresses under section 552.137 of the Government Code. The medical records we have marked may only be released in accordance with the MPA. 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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
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ACV/eeg

Ref: ID# 358324

Enc. Submitted documents

c: Requestor
(w/o enclosures)