



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 13, 2009

Ms. Traci S. Briggs  
Deputy City Attorney  
City of Killeen  
P.O. Box 1329  
Killeen, Texas 76540

OR2009-14430

Dear Ms. Briggs:

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# 358322.

The Killeen Fire Department (the "department") received a request for the personnel file and other information on file for a named former department employee. You state you have released documents from the fire fighter's civil service file for which you claim no exception. You claim the records you marked are excepted from disclosure under sections 552.101, 552.117, and 552.130<sup>1</sup> of the Government Code. We have considered the exceptions you claim and reviewed the submitted records.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code. The City of Killeen 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 fire fighter: one that must be maintained as part of the fire

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<sup>1</sup>Although you raise section 552.101 in conjunction with chapter 730 of the Transportation Code for the Texas motor vehicle record information in the submitted records, section 552.130 of the Government Code is the appropriate exception.

fighter's civil service file and another the fire department may maintain for its own internal use. See Local Gov't Code § 143.089(a), (g). The fire fighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the fire fighter 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. In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against a fire fighter, 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 fire fighter'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 fire fighter'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, information maintained in a fire 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 the records submitted in Exhibit C are kept in the department's internal personnel files maintained under section 143.089(g). Based on this representation and our review of the submitted documents, we agree that these records are subject to section 143.089(g) of the Local Government Code.

We next turn to the information found the fire fighter's civil service file. Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. See *e.g.*, 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 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). 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). The W-4 forms we marked in Exhibit G are confidential under federal law.<sup>2</sup>

Section 552.101 also encompasses medical records, which are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(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). You claim the documents in Exhibit F are medical records. Upon review, we marked the medical records. Based on your representation that the department has not been provided any signed release consenting to these records' release, the information we marked is confidential under section 552.101 in conjunction with the MPA. However, you have not shown the remaining records you marked under the MPA were created by or under the supervision of a physician or contain the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, these records do not constitute medical records for purposes of the MPA, and they may not be withheld on this basis.

Section 552.101 also encompasses section 611.002(a), which provides that "[c]ommunications 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." Health & Safety Code § 611.002(a); *see id.* § 611.001 (defining "patient" and "professional"). Some of the submitted records were created by a mental health professional and reveal the diagnosis, evaluation, or treatment of a patient.

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your argument against disclosure of portions of this information.

Accordingly, the records we marked are confidential under section 552.101 in conjunction with section 611.002.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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 remaining information includes personal financial information regarding the fire fighter's optional insurance coverages and payroll deductions. This office has found that an employee's voluntary insurance choices are intimate financial decisions. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Furthermore, we find there is no legitimate public interest in this information. The remaining information also includes certain medical information that does not necessarily relate to the fire fighter's ability to perform his assigned tasks. This office has found 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 No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). *But see* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the personal financial and medical information, which we have marked, is confidential under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the department must withhold the personal information that pertains to a current or former employee of the department who elected, prior to the department's receipt of the request for information, to keep such information confidential. You state, and provide documentation showing, that the named former employee timely chose to not allow public access to his personal information. Accordingly, we find section 552.117(a)(1) of the Government Code is applicable to the personal information we have marked.

You also claim that the Texas driver's license information in the submitted personnel records is excepted from disclosure under section 552.130 of the Government Code. This section excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. We agree the information we marked is subject to section 552.130 of the Government Code.

The requestor states, however, she is requesting the personnel records of the named individual pursuant to section 157.36 of title 25 of the Texas Administrative Code, which provides in part:

[DSHS] may suspend or decertify an EMS certificant or suspend or revoke a licensed paramedic for, but not limited to, the following reasons:

...

(21) failing or refusing to give the department full and complete information and cooperation, upon request[.]

25 TAC § 157.36(b)(21). We agree that, by its plain language, section 157.36(b) applies to an individual licensed under chapter 773, not to a city or fire department. Additionally, section 157.36(b)(21) describes potential penalties for EMS certificants and licensed paramedics who fail or refuse to provide information to DSHS; it does not provide DSHS a right of access to any information. Accordingly, even if this section applied to the department, it would not provide DSHS with a special right of access to the information at issue. *But see* Health & Safety Code § 773.0612 (providing DSHS representative enforcing chapter 773 a right of access to emergency medical services personnel records). Thus, we conclude the requestor has not established any right of access to the records at issue.

In summary, the department must withhold the W-4 documents we marked under section 552.101 in conjunction with federal law, the medical record information we marked under section 552.101 of the Government Code in conjunction with the MPA, the records of a mental health professional we marked under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, and the private information we marked under section 552.101 in conjunction with common-law privacy. The department must also withhold the personal information we marked under section 552.117 of the Government Code and the Texas motor vehicle record information we marked under section 552.130 of the Government Code. 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](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,

A handwritten signature in black ink, appearing to read 'Bob Davis', with a large, stylized flourish at the end.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 358322

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)