ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2009

Lt. Carol Taylor
Public Information Officer
Taylor County Sheriff's Department
450 Pecan Street
Abilene, Texas 79602-1692

OR2009-17964

Dear Lt. Taylor:

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# 364702.

The Taylor County Sheriff's Department (the "sheriff") received a request for the following information concerning a specified peace officer: evaluations, training records, records of promotions, employment/hiring information, complaints, documentation regarding any "use of force incidents," payroll records, and job assignments. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.115, 552.117, 552.1175, 552.130, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor has specifically excluded the specified peace officer's social security number, personal bank account information, date of birth, medical records, home address and telephone number, and cellular telephone numbers from his request. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

You claim the submitted personnel file is excepted in its entirety under section 552.103 of the Government Code, which provides in relevant 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.
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> . . .
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> (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.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception).

You inform us the submitted personnel file relates to a pending criminal prosecution in which the specified peace officer is a victim/witness. As the sheriff is not a party to the criminal prosecution, the sheriff does not have a litigation interest in the matter for purposes of section 552.103. 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. However, you have not provided this office with an affirmative representation from any governmental body with a litigation interest that the governmental body wishes the responsive information to be withheld pursuant to section 552.103. Accordingly, the sheriff may not withhold the responsive information under section 552.103 of the Government Code based on the pending criminal prosecution.

You indicate the salary information, financial history information, and time sheets contained in the submitted personnel file are confidential personal financial information under section 552.101 of the Government Code. Section 552.101 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 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 satisfied. *Id.* at 681-82.

This office has found the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities). Although you indicate the submitted government salary information and time sheets are protected by common-law privacy, this information pertains to financial transactions between the employee and the sheriff. *See generally* Gov't Code § 552.022(a)(2) (stating, among other things, that public employee's salary is expressly public). Thus, you have failed to demonstrate the applicability of common-law privacy to the government salary information and time sheets.

This office has also found the public has a legitimate interest in information relating to the background and qualifications of employees of governmental bodies. *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). Although the references to the employee's previous salaries may be considered highly intimate or embarrassing, we find there is a legitimate public interest in this information as it pertains to the employee's employment qualifications and background. Thus, the sheriff may not withhold the references to the employee's previous salaries under section 552.101 in conjunction with common-law privacy.

This office has also found personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing. The submitted personnel file includes the following information concerning the specified peace officer's financial history: lists of assets, credit cards, credit reports, and banking history. Based on our review of the information at issue, we find the financial history information we have marked is not of legitimate public concern. *See* Open Records Decision Nos. 545 (mortgage payments, assets, bills, and credit history protected under common-law privacy), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 (1983) (sources of income not related to financial transaction between individual and governmental body generally protected under common-law privacy). Therefore, the sheriff must withhold the financial history information we have marked under section 552.101 in conjunction with common-law privacy.

We note the personnel file contains confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center, which is subject to section 552.101 of the Government Code. Section 552.101 also encompasses information protected by other statutes. 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; 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. However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See id.* § 411.082 (2)(B). Upon review, we find the sheriff must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

We note the remaining documents contain the specified peace officer's L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. Section 1701.306 of the Occupations Code, which is encompassed by section 552.101 of the Government Code, provides in relevant part as follows:

> (a) The [Texas Commission on Law Enforcement Officer Standards and Education] may not issue a license to a person as an officer or county jailer unless the person is examined by:
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> > (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
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> > (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.
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> (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). Therefore, the sheriff must withhold the L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.[1]

You indicate an "injury report," alcohol and drug use questionnaire, and psychological evaluation in the submitted personnel file are medical records which are confidential under section 552.101 of the Government Code. Section 552.101 encompasses 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 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.
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> (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). You do not explain, nor does it appear, that the "injury report," alcohol and drug use questionnaire, and psychological evaluation you have marked were completed as part of any evaluation or treatment of an individual by a doctor or someone under the supervision of a doctor. Therefore, the sheriff may not withhold these documents under section 552.101 in conjunction with the MPA.[2]

We note, however, the psychological evaluation is a mental health record. Section 552.101 of the Government Code encompasses section 611.002(a) of the Health and Safety Code, which pertains to mental health records.[3] Section 611.002(a) 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). Therefore, the sheriff

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

[2]We note the personnel file contains medical records. These records, which we have marked, are not responsive to the request.

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

must withhold the psychological evaluation, which we have marked, under section 552.101 of the Government Code in conjunction with chapter 611 of the Health and Safety Code.

The personnel file contains fingerprint information. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information contained in the personnel file. Therefore, the sheriff must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.[4]

You raise section 552.115 of the Government Code for the submitted birth certificate. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the sheriff, the submitted birth certificate may not be withheld on this basis.

You assert the DD-214 military discharge forms and other documents referring to military service are excepted from disclosure under section 552.140 of the Government Code. Section 552.140 provides a military veteran's DD-214 military discharge 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). Section 552.140 only applies to military discharge records. Therefore, the other submitted documents referring to military service, which are not DD-214 forms or military discharge records, may not be withheld under section 552.140. Additionally, the sheriff received the submitted DD-214 forms before September 1, 2003. Therefore, the sheriff may not withhold the DD-214 forms pursuant to section 552.140.

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[4]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

We understand you to raise section 552.117 of the Government Code for the family member information of the specified peace officer. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Accordingly, the sheriff must withhold the family member information we have marked under section 552.117(a)(2).

Section 552.130 of the Government Code 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. *Id.* § 552.130(a)(1), (2). Accordingly, the sheriff must withhold the copy of the Texas driver's license and driver's license number, class designation, and expiration date, which we have marked, under section 552.130.

Finally, you seek to redact the names of other peace officers in the submitted personnel file. You have not raised any exception for this information, nor have you provided any arguments explaining why these names are excepted from disclosure. *See* Gov't Code § 552.301(b) (governmental body must state exceptions to disclosure that apply within ten business days after receiving request), (e)(1)(a) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Accordingly, we find that you have not established any basis on which this information must be withheld.

In summary, the sheriff must withhold the financial history information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The sheriff must withhold the CHRI we have marked under section 552.101 in conjunction with chapter 411 of the Government Code. The sheriff must withhold the L-2 and L-3 declarations we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code. The sheriff must withhold the psychological evaluation we have marked under section 552.101 of the Government Code in conjunction with the chapter 611 of the Health and Safety Code. The sheriff must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The sheriff must withhold the family member information we have marked under section 552.117(a)(2). The sheriff must withhold the copy of the Texas driver's license and driver's license number, class designation, and expiration date we have marked under section 552.130. The remaining responsive information must be released.[5]

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[5]We note the information being released contains the social security numbers of other peace officers. 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. Therefore, we need not address your arguments against the release of these social security numbers under sections 552.117 and 552.1175.

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,

Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 364702

Enc. Submitted documents

c: Requestor
(w/o enclosures)