



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2010

Mr. Jon Thatcher
Wolfe, Tidwell & McCoy, L.L.P.
2591 Dallas Parkway, Suite 205
Frisco, Texas 75034

OR2010-00323

Dear Mr. Thatcher:

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# 366541 (Anna file No. C03029PIR20091013-01).

The City of Anna (the "city"), which you represent, received a request for the personnel file of a named employee. You state that the city will release portions of the requested information to the requestor. You state the city will redact social security numbers pursuant to section 552.147 of the Government Code and personal information pursuant to section 552.117 of the Government Code.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.130, 552.136, and 552.140 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. Section 552.101 encompasses section 6103(a) of title 26 of the United

¹We 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. *See* Gov't Code § 552.147(b). Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Gov't Code § 552.024(c).

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). 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, interest, fine, forfeiture, or other imposition, 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 forms 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 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes 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 submitted I-9 forms under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the I-9 forms you have marked are confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses Chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. See 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 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the information you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also 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 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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 conclude that the information you have marked consists of medical records that are subject to the MPA. Thus, this information may only be released in accordance with the MPA.

The submitted information also contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by TCLEOSE. These forms are confidential under section 1701.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 provides the following:

(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). Thus, we determine that the city must withhold the submitted L-2 and L-3 declaration forms under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code. Section 1701.454 governs the public availability of an F-5 form ("Report of Separation of Licensee") submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. In this instance, it does not appear that the named officer resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. We, therefore, conclude that the city must withhold the submitted F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

You assert that some of the remaining information contains confidential criminal history record information ("CHRI"). Section 552.101 also encompasses CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Title 28 of part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. We note that the term CHRI does not include driving record information. *See* Gov't Code § 411.082(2)(B). Upon review, we find that, except where marked for release, the information you have marked consists of CHRI for the purposes of chapter 411.

Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. However, no portion of the remaining information consists of CHRI for the purposes of chapter 411. Accordingly, the city may not withhold any of this information under section 552.101 on that basis.

Section 552.102(a) of the Government Code excepts from 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. 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). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common-law right to privacy. See Open Records Decision Nos. 545, 523 (1989). The information we have marked constitutes personal financial and medical information. Further, in this instance, we find that there is not a legitimate public interest in the release of this information. Therefore, the city must withhold the information we have marked under section 552.102 of the Government Code on the basis of common-law privacy.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. See Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We also note a post office box number is not a "home address" for purposes of section 552.117. See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public

employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added). In this case, it is unclear whether the individual whose personal information we have marked is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individual at issue is a licensed peace officer as defined by article 2.12, the city must withhold the personal information we have marked in the submitted documents under section 552.117(a)(2) of the Government Code.

If the individual at issue is not a licensed peace officer, then his personal information may be excepted under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the 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 a particular piece of 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). The city may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual at issue is not a licensed peace officer who timely elected to keep his personal information confidential, the city must withhold the information we have marked and indicated under section 552.117(a)(1). Otherwise, this information may not be withheld under section 552.117.²

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), (2). Accordingly, the city must withhold the driver's license and motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 states that "[n]otwithstanding any other provision of [the Act], 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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). We agree that the insurance policy numbers in the submitted information are access device numbers under section 552.136. Accordingly, the city must withhold the information you have marked under section 552.136 of the Government Code.

²Regardless of the applicability of section 552.117, 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.

Finally, you state that the remaining information includes a military discharge record that may be subject to section 552.140 of the Government Code. Section 552.140 provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 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.

Id. § 552.140(a). Section 552.140 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 only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). You state that the city first came into possession of the DD-214 form that you have marked on or after September 1, 2003. Therefore, the DD-214 form you have marked must be withheld under section 552.140 of the Government Code.

We note that portions of the remaining information contain e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 of the Government Code 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 of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We have marked e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the city has received consent for their release.

In summary, the city must withhold the following information under section 552.101 of the Government Code: 1) the submitted W-4 forms in conjunction with section 6103(a) of title 26 of the United States Code, 2) the information you have marked in conjunction with section 560.003 of the Government Code, 3) the submitted L-2 and L-3 declaration forms in conjunction with section 1701.306 of the Occupations Code, 4) the submitted F-5 forms in conjunction with section 1701.454 of the Occupations Code, 5) except where marked for release, the CHRI you have marked in conjunction with section 411.083 of the Government Code, and 6) the information we have marked under common-law privacy. The I-9 form you have marked is confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system. The medical records you have marked may only be released in accordance with the MPA. The city must withhold the personal information we have marked and indicated under section 552.117(a)(2), to the extent the individual at issue is a licensed peace officer. If the individual at issue is not a licensed peace officer, the city must withhold

the personal information we have marked under section 552.117(a)(1), if the individual at issue timely elected to keep his personal information confidential. The city must withhold the driver's license and motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the information you have marked under section 552.136 of the Government Code and the e-mail addresses we have marked under section 552.137. The DD-214 form the city marked must be withheld under section 552.140 of the Government Code. The remaining information must be released.³

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,


Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 366541

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We 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 I-9 forms, W-4 forms, fingerprint information under section 560.003 of the Government Code, L-2 and L-3 declarations, Texas driver's license and license plate numbers under section 552.130 of the Government Code, insurance policy numbers under section 552.136 of the Government Code, e-mail addresses under section 552.137 of the Government Code, and DD-214 forms, without the necessity of requesting an attorney general decision.