



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2010

Mr. David M. Swope
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-01776

Dear Mr. Swope:

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# 369314 (C.A. File No. 09GEN2312).

The Harris County Constable Precinct 3 (the "constable") received three requests from the same requestor for the internal affairs department files, constable personnel files, constable citizen complaints files, and constable files of disciplinary actions for three named constable deputies. The constable states it does not have a citizen complaint file, disciplinary action file, or internal affairs file on each of the three deputies.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.115, 552.1175, 552.130, 552.136, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you raise section 552.102 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See Gov't Code* §§ 552.301, .302.

Initially, we address the constable's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). The constable received the request for information on November 12, 2009. Although you timely raised sections 552.101, 552.1175, 552.130, 552.136, and 552.147 of the Government Code, you did not raise section 552.115 until December 4, 2009. Thus, with respect to section 552.115, the constable failed to comply with the procedural requirements mandated by section 552.301.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exception at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because the applicability of section 552.115 can provide a compelling reason to withhold information, we will consider the applicability of your claim under this exception. Additionally, we will consider the applicability of your timely raised claims under sections 552.101, 552.1175, 552.130, 552.136, and 552.147. *See* Gov't Code § 552.302; *see also* Open Records Decision No. 150 at 2 (1977).

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. This section encompasses information protected by other statutes. The submitted information contains I-9 Employment Eligibility Verification forms, which are governed by section 1324a of title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, 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 forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude the I-9 forms, which we have marked, are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.³

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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[.]" 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). Thus, the constable must withhold the submitted W-4 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.⁴

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Section 159.002 of the Occupations Code 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.

(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 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. See Occ. Code. § 159.002(a)-(c); see also Open Records Decision No. 598 (1991). We have marked the medical records that may only be disclosed 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:

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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 the constable must withhold the submitted L-2 and L-3 declaration forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to TCLEOSE. 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.

Id. § 1701.454. The submitted information includes F-5 Reports of Separation of License Holder forms. In this instance, it does not appear the named officers resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the constable must withhold the submitted F-5 forms, which we have marked,

pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.⁵

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code which pertains to 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 state agencies 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. *See 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 in accordance with 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the 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. Upon review, we find the information we have marked constitutes CHRI and must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code.⁶ However, the remaining information you have marked does not constitute CHRI, and it may not be withheld on the basis of section 411.083 of the Government Code.

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 id.* §§ 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, section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the constable must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. However, the remaining information you have marked does not constitute a biometric identifier, and it may not be withheld on the basis of section 560.003.

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. 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). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Thus, the constable must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁷ However, you have not demonstrated the remaining information you have marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the remaining information you have marked may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.115(a) of the Government Code provides that "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" Gov't Code § 552.115(a). Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official, and not to information held by the constable. See Open Records Decision No. 338 (1982). Therefore, none of the information at issue may be withheld under section 552.115.

We note that the remaining information includes a military discharge record that is subject to section 552.140 of the Government Code.⁸ 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.

⁷As our ruling is dispositive of this information, we need not address your remaining arguments against disclosure of this information.

⁸The 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).

Gov't Code § 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). We note the constable first came into possession of the DD-214 form and other military discharge record on or after September 1, 2003. Therefore, the DD-214 form and other military discharge record we have marked must be withheld under section 552.140 of the Government Code.⁹

Section 552.117(a)(2) of the Government Code 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.¹⁰ *Id.* § 552.117(a)(2). Section 552.117(a)(2) only applies to records that a governmental body is holding in an employment capacity. We note section 552.117 is not applicable to officers' names, work addresses, work telephone numbers, and birth dates. *Id.* § 552.117(a). We also note section 552.117 encompasses personal cellular telephone numbers, provided 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 telephone numbers paid for by governmental body and intended for official use). We further note the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981). Accordingly, the constable must withhold the named officers' information we have marked under section 552.117(a)(2) of the Government Code.¹¹ However, the constable must only withhold the cellular telephone numbers we have marked if the officers at issue paid for the service with their own funds.

The personal information of those licensed peace officers who are not current or former employees of the constable may be subject to section 552.1175. Section 552.1175 provides in part:

(a) This section applies only to:

⁹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

¹⁰"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

¹¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, 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:

(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.

Gov't Code § 552.1175(a), (b). We have marked personal information of individuals who were not employed by the constable. If these individuals are still licensed peace officers and elected to restrict access to their information in accordance with section 552.1175(b), the constable must withhold the marked information under section 552.1175 of the Government Code.¹² If the individuals are no longer licensed peace officers or if no election is made, the constable may not withhold those individuals' personal information under section 552.1175. We find the remaining information does not consist of personal information of licensed peace officers who are not current or former employees of the constable. Therefore, the constable may not withhold any of the remaining information you have marked under section 552.1175.

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 constable must withhold the Texas driver's license and Texas motor vehicle record information we have marked under section 552.130 of the Government Code.¹³ However, we note section 552.130 does not protect the state of issuance of driver's licenses. Thus, the remaining information you have marked may not be withheld under section 552.130.

¹²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

¹³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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). Accordingly, the constable must withhold the information we have marked under section 552.136 of the Government Code.¹⁴ However, the remaining information you have marked does not contain a credit card, debit card, charge card, or access device number. Therefore, the constable may not withhold any of the remaining information under section 552.136.

Section 552.137 of the Government Code provides “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *Id.* § 552.137(c). Thus, the constable must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

Finally, we note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the constable must withhold the following under section 552.101 of the Government Code: 1) the I-9 forms we have marked in conjunction with section 1324a of title 8 of the United States Code; 2) the W-4 forms we have marked in conjunction with section 6103(a) of title 26 of the United States Code; 3) the marked L-2 and L-3 declaration forms in conjunction with section 1701.306 of the Occupations Code; 4) the marked F-5 forms in conjunction with section 1701.454 of the Occupations Code; 5) the CHRI we have marked in conjunction with section 411.083 of the Government Code; 6) the fingerprint information we have marked in conjunction with section 560.003 of the Government Code; and 7) the information we have marked in conjunction with common-law privacy. The marked medical records may only be disclosed in accordance with the MPA. The constable

¹⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

must withhold the constable's officers' personal information we have marked under section 552.117(a)(2) of the Government Code. However, the constable must only withhold the cellular telephone numbers we have marked if the officers at issue paid for the service with their own funds. The constable must withhold the information we have marked under section 552.1175 of the Government Code, to the extent the individuals whose information is at issue are currently licensed peace officers who elected to restrict public access to their personal information. The constable also must withhold the information we have marked pursuant to sections 552.140, 552.130, 552.136, and 552.137 of the Government Code.¹⁵ The remaining information must be released in accordance with copyright law.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

¹⁵We 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: a direct deposit authorization form under section 552.101 in conjunction with the common-law right to privacy; a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code; L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code; an insurance policy number under section 552.136 of the Government Code; an e-mail address of a member of the public under section 552.137 of the Government Code; and a Form DD-214 or other military discharge record, without the necessity of requesting an attorney general decision.

Ref: ID# 369314

Enc. Submitted documents

c: Requestor
(w/o enclosures)