



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2010

Ms. Lara Garza Jimenez
County Attorney
Nueces County Courthouse
901 Leopold, Room 207
Corpus Christi, Texas 78401-3680

OR2010-05150

Dear Ms. Garza Jimenez:

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#377189.

The Nueces County Sheriff's Office (the "sheriff") received a request for employment and civil service files for a named employee. You state you have released some of the requested information with redactions in accordance with the previous determination issued in Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, and 552.122 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 criminal history records information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. 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

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision. *See* ORD 684.

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 id.* § 411.082(2)(B). Upon review, we find that portions of the submitted information consist of confidential CHRI. Accordingly, the sheriff must, withhold this information, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code § 159.001. 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). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. *See* Open Decision Nos. 598 (1991), 546 (1990). Accordingly, unless the sheriff receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the sheriff must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which provides "[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). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find portions of the information at issue consist of mental health records. Accordingly, the sheriff must withhold the mental health records, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety 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 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. Thus, we agree that the sheriff must withhold the submitted F-5 form under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides as follows:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
 - (2) the person that requested the examination;
 - (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
 - (4) another polygraph examiner in private consultation; or
 - (5) any other person required by due process of law.
- (b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.
- (c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. In this instance, the requestor does not fall within any of the enumerated categories; therefore, the sheriff must withhold the polygraph information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

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). 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, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same 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. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102.

This office has found that information that reflects an individual's personal financial decisions and is not related to a financial transaction between the individual and a governmental body is protected by common-law privacy. See Open Records Decision

Nos. 600 (1992), 545 (1990). Upon review, we conclude that a portion of the submitted information reflects an individual's personal financial decisions and does not involve a financial transaction between this individual and a governmental body. Therefore, the sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). We note that a post office box number is not a "home address" for purposes of section 552.117.² Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We understand that the individual whose information is at issue is a licensed peace officer. Therefore, the sheriff must withhold the information we have marked under section 552.117(a)(2) 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:

(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(b). The remaining information may include the personal information of a licensed peace officer who is not an employee of the sheriff. To the extent this individual is currently a licensed peace officer who elects to restrict public access to his personal information, the sheriff must withhold the information we have marked under section 552.1175. To the extent this individual is not currently a licensed peace officer who elects to restrict public access to his personal information, the sheriff may not withhold the information we have marked pertaining to that individual under section 552.1175.

We note 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

²See 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)).

agency of this state [or] a motor vehicle title or registration issued by an agency of this state.”³ Gov’t Code § 552.130(a). Thus, the sheriff must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

Section 552.122(a) of the Government Code excepts from disclosure “[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]” Gov’t Code § 552.122(a). Section 552.122(b) excepts from 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 seek to withhold interview questions and answers under section 552.122 of the Government Code. You inform us that these questions are used by the sheriff to determine whether individuals have the ability and knowledge base to effectively satisfy the demands of a certain position. You state the sheriff continues to use these questions, and thus, releasing the interview questions and their answers would compromise effectiveness in the future. However, we find the submitted interview questions and answers consist of general questions and information evaluating an applicant’s individual abilities, personal opinions, and subjective ability to respond to particular situations, and do not test any specific knowledge of an applicant. Accordingly, the information at issue is not excepted from disclosure under section 552.122 of the Government Code.

In summary: (1) the sheriff must withhold the information we have marked as CHRI pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; (2) the sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; (3) the sheriff must withhold the mental health records we have marked pursuant to section 552.101 in conjunction with section 611.002 of the Health and Safety Code; (4) the sheriff must withhold the submitted F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; (5) the sheriff must withhold the submitted results of a polygraph test pursuant to section 552.101 of the Government Code

³The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

in conjunction with section 1703.306 of the Occupations Code; (6) the sheriff must withhold the personal financial information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy; (7) the sheriff must withhold the information we have marked pursuant to section 552.117 of the Government Code; (8) to the extent this individual is currently a licensed peace officer who elects to restrict public access to his personal information, the sheriff must withhold the information we have marked under section 552.1175 of the Government Code; (9) the sheriff must withhold the Texas motor vehicle record information we have marked pursuant to 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, 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/jb

Ref: ID#377289

Enc. Submitted documents

c: Requestor
(w/o enclosures)