



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2010

Ms. Neera Chatterjee
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2010-05641

Dear Ms. Chatterjee:

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# 376448.

The University of Texas Medical Branch at Galveston (the "university") received a request for the application file of the requestor's client, including initial recommendations of the requestor's client and an explanation for the rejection of the application and specified appeal procedures. You state the university is releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.1175, and 552.130 of the Government Code. You state that portions of the submitted information may implicate the interests of third parties. Accordingly, you state and provide documentation showing that you informed the third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released.¹ See Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from the Fort Bend County Attorney's Office on behalf of the Fort Bend County Sheriff's Office (the "sheriff") claiming that a portion of the information at issue is excepted from disclosure under sections 552.101

¹The third parties you have notified are as follows: Cabler Polygraph, LLC; Fort Bend County Jail; Fort Bend County District Attorney's Office; La Marque Police Department; Needville Police Department; and the Texas Department of Family and Protective Services.

and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.²

Initially, we note that a portion of the information the sheriff seeks to withhold was not submitted by the university to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). However, we will address the sheriff's arguments against the disclosure of the information submitted by the university.

Next, we note that as of the date of this letter, we have not received comments from any of the third parties, other than the sheriff, explaining why the submitted information should not be released. Therefore, we have no basis to conclude that any of the non-briefing third parties has a protected interest in the submitted information. *See id.* §§ 552.110, .304, .305(d)(2)(B); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information based upon the interests of the non-briefing parties.

Next, we note all of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation by the university into an applicant for employment with the university's police department and completed reports made of, for, or by the university. Pursuant to

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.022(a)(1) of the Government Code, these records are expressly public unless they are either excepted under 552.108 of the Government Code or expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interest and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 552 (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 do not constitute other law that makes information confidential for the purposes of section 552.022(a)(1). Consequently, the submitted information may not be withheld under section 552.103 or section 552.111 of the Government Code. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.1175, and 552.130, we address the submitted arguments under these exceptions.

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 information that other statutes make confidential. Section 1703.306 of the Occupations Code provides in part:

(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[.]

Occ. Code § 1703.306. We have marked the information acquired from a polygraph examination that is confidential under section 552.101 in conjunction with section 1703.306. We note that the university has the discretion to release the marked information pertaining to the requestor's client pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Otherwise, the university must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code which governs the release of the submitted F-5 form. Section 1701.454 provides as follows:

(a) A report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education ("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 section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. Section 1701.454 applies to F-5 forms required to be filed with TCLEOSE under subchapter J of chapter 1701. In this instance, the submitted F-5 form indicates the officer was terminated for "an administrative violation(s) other than truthfulness or insubordination." Additionally, the attached explanation indicates the termination was due to a failure to obey municipal, state, or federal law, but does not indicate the specific reason for termination. Accordingly, we must rule conditionally. If the officer at issue was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, the submitted F-5 form may not be withheld under section 552.101 of the Government Code in conjunction with 1701.454 of the Occupations Code. If, however, the officer at issue was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, then the university must withhold the submitted F-5 form you have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides in relevant part:

(a) The [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 the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the university must withhold the L-2 and L-3 declaration forms and the attachment to the L-2 form you have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Next, the university and the sheriff claim that some of the submitted information is confidential pursuant to section 261.201 of the Family Code, which is also encompassed by section 552.101 of the Government Code. Section 261.201 of the Family Code provides as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services ("DFPS")] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of

reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

Fam. Code § 261.201(a), (k). The sheriff asserts that report number 08-13878 pertains to an investigation by the sheriff of alleged or suspected child abuse and consists of files, reports, records, communications, and working papers used or developed in the investigation. Additionally, the university has marked information it received from the DFPS concerning a related investigation that the university contends was conducted pursuant to chapter 261. *See id.* § 261.001(1)(A) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Based on the representations of the university and the sheriff and our review, we find that report number 08-13878 and the DFPS investigation materials, which we have marked, are generally within the scope of section 261.201 of the Family Code. However, we find that the remaining information the university has marked does not consist of files, reports, records, communications, and working papers used or developed in an investigation under chapter 261, and this information may not be withheld under section 552.101 on that basis.

In this instance, the requestor is the legal representative of a parent of the child victim listed in the information we have marked as subject to section 261.201. The requestor’s client is also one of the individuals alleged to have committed the alleged abuse and, as such, the requestor does not have a right of access to the information pursuant to section 261.201(k). *See id.* § 261.201(k). Accordingly, we conclude the information we have marked is confidential under section 261.201 of the Family Code and the university must withhold the marked information under section 552.101 of the Government Code.³ *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Next, the sheriff claims that report number 08-14173 is excepted from disclosure under section 552.108(a)(2) of the Government Code, which excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The sheriff states that report

³As our ruling is dispositive for the information we have marked under section 261.201 of the Family Code, we need not address the remaining argument against the disclosure of portions of this information.

number 08-14173 pertains to a criminal investigation by the sheriff that has been closed and that did not result in conviction or deferred adjudication. Based on the sheriff's representation and our review, we find that section 552.108(a)(2) is applicable to report number 08-14173.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, the university may withhold report number 08-14173, which we have marked, on behalf of the sheriff under section 552.108(a)(2) of the Government Code.⁴

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.⁵ Gov't Code § 552.117(a)(2). We note section 552.117 is also applicable to 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 telephone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the cellular telephone service of the university police officer was paid for with his own funds, the university must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code.

Next, you have marked the cellular telephone number of a City of Needville police officer in several places in the remaining information under section 552.1175 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

⁴As our ruling is dispositive, we need not address your remaining argument against the disclosure of a portion of report number 08-14173.

⁵Although you raise section 552.1175 for the cellular telephone number of a university police officer, we note that section 552.117 is the proper exception in this instance because the university holds this information in an employment capacity. Accordingly, we will address your argument for this information under section 552.117, not section 552.1175.

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). We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is paid for by the peace officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). We agree that the City of Needville police officer's cellular telephone you marked may be subject to section 552.1175. We have also marked the addresses and cellular telephone numbers of officers from other law enforcement departments which may be subject to section 552.1175. If the officers at issue are currently licensed peace officers under article 2.12 of the Code of Criminal Procedure who elect to restrict access to their information in accordance with section 552.1175(b), then the university must withhold the marked information under section 552.1175 of the Government Code. However, the university may only withhold the cellular telephone numbers marked under section 552.1175 if the cellular telephone service was paid for with each officer's own funds.

Section 552.130 of the Government Code excepts from public disclosure information that relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). We note that section 552.130 protects personal privacy. In this instance, the requestor has a right of access under section 552.023 to his client's Texas motor vehicle information. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). However, upon review, the university must withhold the Texas motor vehicle record information not pertaining to the requestor's client, which we have marked in the remaining information, under section 552.130 of the Government Code.⁶

⁶As you acknowledge, 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 Texas driver's license numbers, under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the marked polygraph information is confidential under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, but the university has the discretion to release this information pursuant to section 1703.306(a)(1) of the Occupations Code. If the officer at issue was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, then the university must withhold the marked F-5 form pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The university must withhold the submitted L-2 and L-3 declaration forms and the attachment to the L-2 form you have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. With the exception of basic information, which must be released, the university may withhold report number 08-14173, on behalf of the sheriff under section 552.108(a)(2) of the Government Code. If the cellular telephone service of the university police officer was paid for with his own funds, the university must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. If the officers at issue are currently licensed peace officers under article 2.12 of the Code of Criminal Procedure who elect to restrict access to their information in accordance with section 552.1175(b), the university must withhold the marked information under section 552.1175 of the Government Code. However, the university may only withhold the cellular telephone numbers marked under section 552.1175 of the Government Code if the cellular telephone service was paid for with each officer's own funds. The university must withhold the Texas motor vehicle record information not pertaining to the requestor's client, which we have marked in the remaining information, under section 552.130 of the Government Code. The remaining information must be released.⁷

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,

⁷We note the remaining information contains social security numbers not pertaining to the requestor. 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. Gov't Code § 552.147. We also note that the requestor has a special right of access to some of the information being released in this instance. *Id.* § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 376448

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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