



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2010

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

OR2010-07122

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# 379756 (C.A. File No. 10GEN0504).

The Harris County Constable Precinct 8 (the "constable") received a request for the personnel file of a named officer. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.115, 552.1175, 552.130, 552.136, and 552.147 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 public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 6103(a) of title 26 of the United States Code. This office has held section 6103(a) of title 26 of the United States Code 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 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). Consequently, the constable

must withhold the submitted W-4 form, which we have marked, under section 552.101 in conjunction with section 6103(a).¹

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code, which provides 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 form under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find the I-9 form we have marked is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.²

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 deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except 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 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 in conjunction with Government Code chapter 411, subchapter F. Upon review, we find the constable must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083. *See id.* § 411.083(b)(3).

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 § 151.001-165.160. Section 159.002 of the MPA provides in relevant part:

¹As our ruling is dispositive of this information, we need not address your remaining arguments against disclosure of portions of this information.

²As our ruling is dispositive of this information, we need not address your remaining arguments against disclosure of portions of this information.

(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(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). Upon review, we find the remaining information contains medical records that are subject to the MPA. Accordingly, the constable may only release this information, which we have marked, in accordance with the MPA.

You seek to withhold fingerprints from the remaining information. Section 552.101 of the Government Code 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). Upon review of the remaining information, we find it does not contain fingerprints. Consequently, the constable may not withhold any of the remaining information under section 552.101 in conjunction with section 560.003 of the Government Code.

Next, you state the submitted information contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education ("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). Upon review of the remaining information, we find it does not contain an L-2 or L-3 declaration. Consequently, the constable may not withhold any of the remaining information under section 552.101 in conjunction with section 1701.306.

You claim portions of the remaining information are confidential under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy and under section 552.102 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). Accordingly, we will consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps) and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600, 545 (1990). Upon review, we

agree portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Therefore, the constable must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.³

You also assert portions of the remaining information are subject to section 552.115(a) of the Government Code, which provides “[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 [required public disclosure.]” 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 some of the remaining information is subject to section 552.117(a)(2), of the Government Code.⁴ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁵ Gov’t Code § 552.117(a)(2). We note section 552.117 is not applicable to officers’ names, ages, work telephone numbers, and birth dates. *Id.* § 552.117(a). Additionally, we also note a post office box number is not a “home address” for purposes of section 552.117. *See id.* § 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)). However, 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 phone numbers paid for by governmental body and intended for official use). Accordingly, the constable must withhold the named officer’s information we have marked under section 552.117(a)(2).⁶ However, the constable may only withhold the cellular telephone number we have marked if the officer at issue paid for the service with his own funds.

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

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

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

Next, you argue section 552.1175 of the Government Code excepts portions of the remaining information. Section 552.1175 provides in part:

(a) This section applies only to:

(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)(1), (b). We have marked the personal information of an individual who is not employed by the constable. If this individual is still a licensed peace officer and elects to restrict access to his information in accordance with section 552.1175(b), the constable must withhold the marked information under section 552.1175. If this individual is no longer a licensed peace officer or if no election is made, the constable may not withhold the individual's personal information under section 552.1175. Furthermore, the information you have marked does not relate to the home address, home telephone number, social security number, or family information of a peace officer who is not employed by the constable. Therefore, the constable may not withhold the information you have marked under section 552.1175.

Next, you argue portions of the remaining information are excepted under section 552.130 of the Government Code, which 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[.]" *Id.* § 552.130(a)(1). Accordingly, the constable must withhold the driver's license information we have marked under section 552.130. However, the remaining information you have marked does not constitute Texas motor vehicle record information. Thus, the remaining information you have marked may not be withheld under section 552.130.

Next, you assert the remaining information you have marked is excepted under section 552.136 of the Government Code. Section 552.136 provides "[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 access device numbers have marked under section 552.136. However, the check number you have marked does not constitute an access device number. Therefore, the constable may not withhold any of the remaining information under section 552.136.

Finally, 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. *See id.* § 552.137(c). We have marked a personal e-mail address that is not of a type specifically excluded by section 552.137(c). Accordingly, the constable must withhold the marked personal e-mail address under section 552.137, unless the owner of the e-mail address affirmatively consented to its public disclosure.

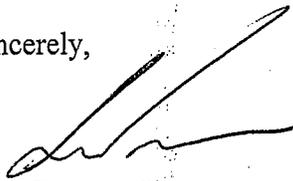
In summary, the constable must withhold the following under section 552.101 of the Government Code: (1) the marked W-4 form pursuant to section 6103(a) of title 26 of the United States Code; (2) the marked I-9 form in conjunction with federal law; and (3) the information we have marked in conjunction with common-law privacy. The constable must withhold the named officer’s information we have marked under section 552.117(a)(2) of the Government Code; however, the constable may only withhold the officer’s cellular telephone number if the officer paid for the service with his own funds. The constable must also withhold information we have marked under section 552.1175 of the Government Code, to the extent the individual whose information is at issue is currently a licensed peace officer who elected to restrict public access to his personal information. Lastly, the constable must withhold the (1) driver’s license information we have marked under section 552.130 of the Government Code; (2) access device numbers we have marked under section 552.136 of the Government Code; and (3) personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release.⁷ The remaining information must be released.

⁷We 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 of the Government Code in conjunction with common-law privacy; a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; a Texas driver’s license number under section 552.130 of the Government Code; bank routing numbers and bank account numbers under section 552.136 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 379756

Enc: Submitted documents

c: Requestor
(w/o enclosures)