



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2010

Ms. Shanna S. Cargill
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P.O. Box 50149
Denton, Texas 76206

OR2010-11134

Dear Ms. Cargill:

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# 388172.

The City of Celina (the "city"), which you represent, received a request for (1) the personnel records of three named peace officers and (2) certain law enforcement records pertaining to two named individuals. You state some of the requested information will be released. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.114, 552.115, 552.1175, 552.130, 552.137, and 552.147 of the Government Code.¹ 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 information made confidential by federal law, such as section 1324a of title 8 of the United States Code. This section provides an Employment Eligibility Verification I-9 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). The submitted information contains an I-9 form. Release of this document in this instance

¹Although you also raise section 552.107 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

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

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 agree portions of the remaining information consist of mental health records. Accordingly, the city 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.²

The remaining information contains peace officers’ L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides as follows:

(a) The commission 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

²As our ruling is dispositive, we do not address your remaining argument against the disclosure of this information.

on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Accordingly, the city must withhold the L-2 and L-3 declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 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 [Polygraph Examiners B]oard 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.

Id. § 1703.306. A portion of the remaining information, which we have marked, consists of information acquired from polygraph examinations subject to section 1703.306. The requestor does not appear to fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the city must withhold the marked polygraph information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Next, we will address your claim under chapter 411 of the Government Code, which is also encompassed by section 552.101 of the Government Code. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center is confidential under federal and state law. *See* Gov't Code § 411.083(a). Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b). Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the Department of Public Safety ("DPS") or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. We note, however, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See id.* § 411.082(2)(B). Additionally, section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.0811(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we agree portions of the remaining information consist of CHRI subject to chapter 411. The city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

We note the remaining information includes fingerprint information. Section 552.101 encompasses section 560.003 of the Government Code, which provides a governmental body may not release fingerprint information except in certain limited circumstances. *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 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprint information at issue. Therefore, the city must withhold the fingerprint information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

We note portions of the remaining information are subject to common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects

information if it (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 satisfied. *Id.* at 681-82. This office has found personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (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). In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked portions of the remaining information that are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right of privacy.

Section 552.114 of the Government Code excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). The federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions only apply to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). Although the submitted information includes educational records, these records are maintained by the city, which is not an educational institution. You do not inform us the city received the submitted records from the educational institution that created them. Therefore, we find the city may not withhold the submitted educational records on the basis of section 552.114 of the Government Code or FERPA.

You raise section 552.115 of the Government Code for the submitted birth certificates. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration

officials). Because section 552.115 does not apply to information held by the city, the submitted birth certificates may not be withheld on this basis.

Section 552.117(a)(2) of the Government Code exempts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). In addition, 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). Therefore, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.³ However, the city may only withhold the personal cellular telephone numbers we have marked if the cellular services were paid for with personal funds.

We note portions of the remaining information pertaining to peace officers other than those employed by the city may be subject to section 552.1175 of the Government Code. 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 portions of the remaining information that may be subject to section 552.1175. To the extent this information pertains to currently

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

licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), it must be withheld. As previously noted, the city may only withhold a personal cellular telephone number if the cellular services were paid for with personal funds.

Section 552.130 of the Government Code excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit or Texas motor vehicle title or registration. *Id.* § 552.130(a)(1), (2). Accordingly, the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.⁴

Portions of the remaining information are subject to section 552.136 of the Government Code, which provides "[n]otwithstanding any other provision of this chapter, 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."⁵ *Id.* § 552.136; *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

You also raise section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a), (b). Upon review, however, we find none of the remaining information consists of an e-mail address subject to section 552.137. Therefore, none of the remaining information may be withheld pursuant to section 552.137 of the Government Code.

In summary, the marked I-9 form is subject to section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with (1) section 611.002(a) of the Health and Safety Code, (2) section 1701.306 of the Occupations Code, (3) section 1703.306 of the Occupations Code, (4) chapter 411 of the Government Code, (5) section 560.003 of the Government Code, and (6) common-law privacy. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The city must also withhold the information we marked under section 552.1175 of the Government Code, to the extent this information pertains to currently licensed peace

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

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

officers who elect to restrict access to their information in accordance with section 552.1175(b). In either case, the city may only withhold the personal cellular telephone numbers we have marked if the cellular services were paid for with personal funds. Finally, the city must withhold the information we marked under sections 552.130 and 552.136 of the Government Code.⁶ 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/sdk

Ref: ID# 388172

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including 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, Texas driver's license and license plate numbers under section 552.130 of the Government Code, and bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.