



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2010

Mr. Steven L. Weathered
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2010-13331

Dear Mr. Weathered:

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# 392406.

The Seabrook Police Department (the "department"), which you represent, received a request for the personnel file and disciplinary record of a named police officer.¹ You state you will release some information to the requestor. You further state you will redact certain information pursuant to the previous determinations issued by this office in Open Records Decision Nos. 670 (2001) and 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.115, 552.117,

¹You state that the requestor subsequently narrowed the request to exclude time and pay records. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²*See* Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information, of peace officers without the necessity of requesting attorney general decision under section 552.117(a)(2); *see also* Gov't Code § 552.301(a); Open Records Decision Nos. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301), 684 (2009) (previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.).

552.1175, 552.122, 552.130, 552.136, 552.137, and 552.147 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

We note the department did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.” See Gov’t Code § 552.301(b). While the department raised the rest of its claimed exceptions within the ten-business-day time period as required by subsection 552.301(b), the department did not raise section 552.102 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. See *id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. See Gov’t Code § 552.352; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). However, because section 552.102 is a mandatory exception that can provide a compelling reason to withhold information, we will consider your arguments under this exception. See Gov’t Code § 552.302; *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 Open Records Decision No. 630 (1994).

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. This exception encompasses information other statutes make confidential, such as 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:

³Section 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. Although you also raise section 552.119 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. You also claim that some of the information at issue is confidential under section 552.101 of the Government Code in conjunction with section 552.136; we note, however, that section 552.101 does not encompass other exceptions to disclosure under the Act. You also raise section 552.026 of the Government Code; we note, however, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232(a) of title 20 of the United States Code. Gov’t Code § 552.026.

⁴We assume 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.

(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). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We agree the submitted information contains medical records subject to the MPA. Accordingly, the department must withhold the medical records we have marked pursuant to section 552.101 of the Government Code in conjunction with the MPA unless the department receives written consent for release of this information that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 also 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 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 some of the submitted information consists of confidential CHRI. Accordingly, the department 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. However, none of the remaining information you seek to withhold

under this exception constitutes CHRI for purposes of chapter 411. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

The submitted documents include a CR-3 accident report form completed pursuant to chapter 550 of the Transportation Code.⁵ See Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *Id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has not provided the department with two of the three requisite pieces of information. Therefore, the department must withhold the submitted CR-3 accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

The remaining 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.

⁵Section 552.101 also encompasses chapter 550 of the Transportation Code.

Occ. Code § 1701.306(a), (b). The department must withhold the submitted L-2 and L-3 declaration forms and the attachment to the L-3 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

The remaining information contains an F-5 form ("Report of Separation of Licensee") submitted to TCLEOSE under chapter J of chapter 1701 of the Occupations Code. This form is confidential under section 1701.454 of the Occupations Code, which is also encompassed by section 552.101, and 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. In this instance, it does not appear that the named officer resigned due to a substantiated incident of excessive force or violations of the law other than traffic offenses. Thus, the department 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 also encompasses section 1703.306(a) of the Occupations Code, which provides, "[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[.]" *Id.* § 1703.306(a). The submitted information includes polygraph information subject to section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we conclude the department must withhold the information acquired from a polygraph examination, which we 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. 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). 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd

n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. Accordingly, we will consider your claim under section 552.101 in conjunction with common-law privacy and your claim under section 552.102(a) together.

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.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

This office has found that 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 identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, this office has found that an individual's criminal history when compiled by a governmental body may be protected under common-law privacy. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). This office has also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that 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. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 (1989) (information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy). Upon review, we find that the information we have marked is confidential under common-law privacy and must be withheld under sections 552.101 and 552.102 of the Government Code on that basis.

You have also marked information relating to the police officer's background under common-law privacy. This information relates solely to the individual's qualifications and ability to execute the duties of a police officer. We note that the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not

involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Because there is a legitimate public interest in the qualifications and job performance of public employees, the department may not withhold the background information from disclosure based on a right of privacy.

Furthermore, we find that no portion of the remaining submitted information is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102 of the Government Code.

Section 552.108(a)(2) of the Government Code excepts “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming sections 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) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

You seek to withhold the investigation of a complaint against the named officer under section 552.108. We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). The records at issue are personnel documents maintained by the department for administrative purposes. Accordingly, you have failed to demonstrate that section 552.108 applies. Thus, the department may not withhold any portion of the remaining information under section 552.108(a)(2).

Next, you claim the submitted academic transcript is excepted from disclosure under section 552.114 of the Government Code, which excepts from disclosure student records “at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). FERPA 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). The department, which maintains the information at issue, is not an educational institution. *See Open Records Decision No. 309 at 3 (1983)* (City of Fort Worth is not an “educational agency” within

FERPA). You do not assert, nor does it appear from our review, that the department received this document directly from the educational institution at issue; therefore, the department has not established that section 552.114 and FERPA are applicable to the information at issue, and the department may not withhold the information on those grounds.

The department also raises section 552.115 of the Government Code. Section 552.115(a) 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 department. *See* Open Records Decision No. 338 (1982). Therefore, none of the submitted information may be withheld under section 552.115 of the Government Code.

You state the department will redact the information you have marked under section 552.117(a)(2) of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 670 (2001). As stated previously, Open Records Decision No. 670 authorizes the withholding of home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family information, of peace officers, without the necessity of requesting an attorney general decision. In this instance, we note that some of the information you have marked is not subject to section 552.117 of the Government Code. Therefore, we will address the applicability of section 552.117 to the information at issue.

Section 552.117(a)(2) of the Government Code 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 requested confidentiality under section 552.024 or 552.1175 of the Government Code.⁶ Gov’t Code § 552.117(a)(2). Accordingly, the department must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. However, none of the remaining information at issue falls within the scope of section 552.117 and it may not be withheld on this basis.

We note that some of the remaining information may be subject to section 552.1175 of the Government Code. This section 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

⁶“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

- (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.

Id. § 552.1175(b). The documents contain personal information of a peace officer who is not employed by the department. If the individual at issue qualifies as a peace officer under section 2.12 of the Code of Criminal Procedure and elects to restrict access to personal information in accordance with section 552.1175, the department must withhold the information we have marked. To the extent the individual at issue does not elect to keep this information confidential, it may not be withheld on this basis.

You assert the submitted interview score sheets, roster, personnel orientation document, and performance evaluation are excepted from disclosure under section 552.122 of the Government Code. This section 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" 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. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.* at 6. 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. Upon review, we find that the information at issue does not test any specific knowledge of an applicant. Therefore, we conclude that the department has failed to demonstrate that the information at issue consists of test items for purposes of section 552.122. Accordingly, the submitted interview score sheets, roster, personnel orientation document, and performance evaluation may not be withheld from disclosure under section 552.122 of the Government Code.

You state you will withhold portions of the submitted information under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009). As previously noted, Open Records Decision No. 684 is a previous determination authorizing all governmental bodies 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. We note that some of the information you have marked is not subject to section 552.130 of the Government Code. Therefore, we will address the applicability of section 552.130 to the information at issue.

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 agency of this state." Gov't Code § 552.130(a)(1). The department must withhold the information we have marked under section 552.130 of the Government Code. However, none of the remaining information at issue falls within the scope of section 552.130 and it may not be withheld on this basis.

Section 552.136 of the Government Code states that “[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.” *Id.* § 552.136. Although you raise section 552.136, we find that the department has failed to demonstrate how any portion of the submitted information constitutes a credit card, debit card, charge card, or access device number subject to section 552.136. We therefore conclude that the department may not withhold any portion of the submitted information under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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)-(c). The submitted information does not include an e-mail address of a member of the public. Therefore, no part of the submitted information may be withheld under section 552.137 of the Government Code.

In summary, the department must withhold under section 552.101 of the Government Code (1) the medical records we have marked in conjunction with the MPA unless the department receives written consent for release of this information that complies with sections 159.004 and 159.005 of the MPA; (2) the CHRI we have marked in conjunction with section 411.083 of the Government Code; (3) the submitted CR-3 accident report in conjunction with section 550.065(b) of the Transportation Code; (4) the submitted L-2 and L-3 declaration forms and the attachment to the L-3 form we have marked in conjunction with section 1701.306 of the Occupations Code; (5) the submitted F-5 form in conjunction with section 1701.454 of the Occupations Code; and (6) the information acquired from a polygraph examination, which we have marked, in conjunction with section 1703.306 of the Occupations Code. The information we have marked is confidential under common-law privacy and must be withheld under sections 552.101 and 552.102 of the Government Code on that basis. The department must withhold the information we have marked pursuant to sections 552.117 and 552.130 of the Government Code. If the individual at issue qualifies as a peace officer under section 2.12 of the Code of Criminal Procedure and elects to restrict access to personal information in accordance with section 552.1175, the department must withhold the information we have marked under section 552.1175 of the Government Code. Otherwise, this information must be released, along with the remaining submitted information.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/em

Ref: ID# 392406

Enc. Submitted documents

c: Requestor
(w/o enclosures)