



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 8, 2010

Mr. B. Chase Griffith  
Brown & Hofmeister, L.L.P.  
For City of McKinney  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2010-16926

Dear Mr. Griffith:

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# 399358 (ORR# 10-2732 & 10-2944).

The McKinney Police Department (the "department"), which you represent, received two requests from the same requestor for all personnel records pertaining to three named individuals, as well as information regarding a specified incident involving the named individuals and the requestor's husband. You state the department has provided some of the requested information to the requestor. You also state the department has and will withhold social security numbers under section 552.147 of the Government Code.<sup>1</sup> You claim the submitted personnel and investigation records are excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted audio recordings do not pertain to the individuals named or incident specified in the requests for information. Thus, these records, which we

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<sup>1</sup>We note 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.

have indicated, are not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). Although you assert some of the submitted information is protected under the MPA, you have not marked, or otherwise indicated, what information you claim is subject to the MPA. *See* Gov't Code § 552.301(e)(2) (governmental body must label copy of information at issue to indicate which exceptions apply to which parts of the information). Furthermore, upon review, we find none of the submitted information constitutes medical records or information obtained from medical records for purposes of the MPA. Therefore, none of the submitted information may be withheld on the basis of the MPA.

Section 552.101 also encompasses section 411.192 of the Government Code, which governs the release of all information maintained by the Department of Public Safety ("DPS") concerning the licensure of individuals to carry a concealed handgun, and provides:

(a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any

individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Gov't Code § 411.192(a), (b). We have marked a portion of the submitted personnel records that appears to have been received by the department from DPS. In this instance, the requestor is not a criminal justice agency, nor is the requestor a license holder whose information is at issue. Further, we note section 411.193 is not applicable in this instance. *See id.* § 411.193 (making a statistical report including the number of licenses issued, denied, revoked, or suspended by the department during the preceding month available to the public). Therefore, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (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 DPS maintains, except DPS may disseminate this information as provided in 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 not release CHRI except to another criminal justice agency for a criminal justice purpose. *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. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked information in the remaining personnel records that constitutes CHRI that is confidential under chapter 411. Accordingly, the marked information must be withheld under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

The remaining personnel records contain one of the named individual's fingerprints. Section 552.101 also encompasses section 560.003 of the Government Code, which provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless the individual consents to disclosure). Therefore, the department must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

You claim the submitted F-5 Report of Separation of License Holder form in the remaining personnel records is confidential under section 1701.454 of the Occupations Code. Section 552.101 also encompasses section 1701.454, which provides in relevant part "[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 [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses." Occ. Code § 1701.454(a). In this instance, it does not appear the officer whose information is at issue resigned due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the F-5 form, which we 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 1703.306 of the Occupations Code, which provides:

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

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked information in the remaining personnel records that was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. It does not appear the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

You claim unspecified portions of the remaining personnel records are protected under common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *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). The remaining personnel records contain a former employee's medical information and information pertaining to optional benefits choices, debts, and credit history. We have marked this information, which we find is not of legitimate public concern. Therefore, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

This office has found, however, the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We note the majority of the remaining personnel records pertains to employment application documents, employee training records, and complaints and an investigation of alleged employee misconduct. Although some of this information may be considered highly intimate or embarrassing, we find there is a legitimate public interest in information related to the job performances of the individuals involved. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You state the department will withhold certain information pertaining to the named employees at issue in the personnel records under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670 (2001).<sup>2</sup> Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, 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.<sup>3</sup> Gov't Code § 552.117(a)(2). In this instance, the personnel records reflect at least one of the individuals at issue is no longer employed by the department, and it is unclear whether either of the individuals at issue is currently a licensed peace officer as defined by article 2.12. To the extent the individuals are currently licensed peace officers as defined by article 2.12, the department may withhold their home addresses, home telephone numbers, family member information, and social security numbers under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670. If the individuals are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

However, if the employees at issue are no longer licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, social security number, and

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<sup>2</sup>We note the previous determination issued in ORD 670 authorizes all governmental bodies to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals at issue are no longer peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024, the department must withhold their home addresses, home telephone numbers, family member information, and social security numbers under section 552.117(a)(1). If the named individuals are no longer peace officers and did not timely elect to keep their personal information confidential, that information must be released.

The remaining personnel records contain information that may be subject to section 552.1175 of the Government Code.<sup>4</sup> This section provides in relevant part:

(a) This section applies only to:

...

(7) criminal investigators of the United States as described by Article 2.122(a), 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)(7), (b). For purposes of section 552.1175, criminal investigators include marshals and deputy marshals of the United States Marshals Service. *See* Code

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

Crim. Proc. art. 2.122(a)(9). The remaining personnel records contain a federal air marshal's home address and home telephone number, which we have marked. To the extent the individual whose information we have marked is still a federal air marshal and he elects to restrict access to his personal information in accordance with section 552.1175, the department must withhold the marked home address and telephone number under section 552.1175 of the Government Code. Otherwise, this information may not be withheld under section 552.1175 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We have marked a Texas driver's license number, expiration date, class, and restrictions; a vehicle identification number; and a Texas license plate number and expiration date in the remaining personnel records. The department must withhold this information under section 552.130 of the Government Code.

The remaining personnel records contain insurance policy and bank account numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device 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.

(b) Notwithstanding 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. We conclude the insurance policy and bank account numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the marked information under section 552.136 of the Government Code.

The remaining personnel records include e-mail addresses subject to 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)-(c). The e-mail addresses

at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

The remaining personnel records contain DD-214 forms. Section 552.140 of the Government Code provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). We have marked the DD-214 forms at issue. You do not inform us when the department came into possession of these forms. Therefore, if the department came into possession of the forms on or after September 1, 2003, it must withhold the marked DD-214 forms under section 552.140 of the Government Code. If the forms were received by the department before September 1, 2003, then the department may not withhold them pursuant to section 552.140 of the Government Code.

You claim the submitted incident reports and internal affairs investigation records are excepted under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure "[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[.]" *Id.* § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution of the officer's alleged misconduct. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied); *see also* Open Records Decision No. 350 at 3-4 (1982).

You state, and the submitted investigation records reflect, the internal affairs investigation resulted in a criminal investigation conducted by the department. You assert the submitted internal affairs investigation records and incident report numbers 05-046666 and 05-047060 pertain to that criminal investigation, which you represent did not result in a conviction or deferred adjudication. Based on your representations and our review, we agree section 552.108(a)(2) is applicable to this information.

Section 552.108, however, does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to

the information held to be public in *Houston Chronicle Publishing 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), and includes a detailed description of the offense. See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the submitted internal affairs investigation records, including the audio recordings, and incident report numbers 05-046666 and 05-047060 may be withheld under section 552.108(a)(2) of the Government Code. We note you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, the department must withhold under section 552.101 of the Government Code (1) the marked concealed handgun license information in conjunction with section 411.192 of the Government Code; (2) the marked CHRI in conjunction with federal law and chapter 411 of the Government Code; (3) the marked fingerprints in conjunction with section 560.003 of the Government Code; (4) the marked F-5 form in conjunction with section 1701.454 of the Occupations Code; (5) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; and (6) the marked medical and personal financial information in conjunction with common-law privacy. To the extent the individuals whose personnel records are at issue are currently licensed peace officers, the department may withhold their home addresses, home telephone numbers, family member information, and social security numbers under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670. If the individuals are no longer peace officers, then to the extent they timely elected confidentiality under section 552.024 of the Government Code, the department must withhold their home addresses, home telephone numbers, family member information, and social security numbers under section 552.117(a)(1) of the Government Code. To the extent the individual whose information we have marked is still a federal air marshal and he elects to restrict access to his personal information in accordance with section 552.1175 of the Government Code, the department must withhold the marked home address and telephone number under section 552.1175 of the Government Code. The department must withhold (1) the marked Texas motor vehicle record information under 552.130 of the Government Code; (2) the marked insurance policy and bank account numbers under section 552.136 of the Government Code; (3) the marked e-mail addresses under section 552.137 of the Government Code; and the marked DD-214 forms under section 552.140 of the Government Code, if the department came into possession of the forms on or after September 1, 2003.<sup>5</sup>

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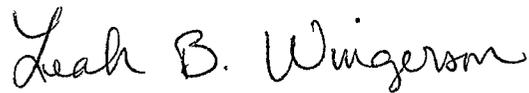
<sup>5</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; Texas driver's license and license plate numbers under section 552.130 of the Government Code; insurance policy and bank account numbers under section 552.136 of the Government Code; e-mail addresses of members of the public under section 552.137 of the Government Code; and DD-214 forms under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.

With the exception of basic information, the department may withhold the submitted internal affairs investigation records and incident report numbers 05-046666 and 05-047060 under section 552.108(a)(2) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 399358

Enc. Submitted documents

c: Requestor  
(w/o enclosures)