



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2010

Ms. Leticia Garza
City Clerk
City of Baytown
P.O. Box 424
Baytown, Texas 77522

OR2010-17439

Dear Ms. Garza:

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# 400312 (Baytown PIR #2073).

The City of Baytown (the "city") received a request for a named individual's employment application cover letter, criminal background check, driver's license check, pre-employment testing, job reference check, drug screen test, and physical exam. You provide documentation reflecting the city does not have the requested cover letter, pre-employment testing, or job reference check.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested third party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.*

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the governmental body. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

§ 552.101. Section 552.101 encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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.

Occ. Code § 159.002(b), (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). The submitted information includes two pre-employment physical and drug screening records created by the named individual’s physician that pertain to that physician’s evaluation of the named individual. We find these documents, which we have marked, are medical records for purposes of the MPA, and the city may only release these documents in accordance with the MPA.

Section 552.101 of the Government Code also encompasses criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”). Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“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. 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. Although we understand you to claim the submitted information is confidential under chapter 411, you do not state, and the information does not reflect, that any part of the submitted information was generated by the NCIC or TCIC. Further, the submitted information reveals the named individual’s driving record information, which is not made confidential by the confidentiality provisions that govern CHRI. *See id.* § 411.082(2)(B) (definition of CHRI does not include driving record information). Accordingly, we conclude you failed to show how the submitted information constitutes confidential CHRI, and it may not be withheld as such.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) exempts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552.102(a).

Section 552.102 is applicable to information that relates to current and former 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 Board*, 540 S.W.2d 668 (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.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 685. Generally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). However, a compilation of one's routine traffic violations is not a compilation of criminal history for purposes of common-law privacy. Cf. Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information).

You claim the submitted information includes a compilation of the individual's criminal history. However, because the submitted information only reveals routine traffic offenses, this is not a criminal history compilation. Moreover, this information was used and considered in the city's hiring of the named employee. This office has stated in numerous decisions that information pertaining to the background and qualifications of public employees is subject to a legitimate public interest and therefore is generally not protected from disclosure under common-law privacy. Open Records Decision No. 444 at 4 (1986); see Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the remaining submitted information may not be withheld on the basis of common-law privacy.

Portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and 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* Gov't Code § 552.117(a)(1). We note that an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* 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. 1979, 69th Leg. (1985)) (emphasis added)). 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. Upon review, we marked the named individual's social security number and home address information. If the named individual properly elected to withhold this information, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. If the named individual did not elect to withhold this information prior to the city's receipt of this request for information, the information we marked may not be withheld under section 552.117.³

The remaining information contains a Texas driver's license number that is subject to section 552.130 of the Government Code. Section 552.130 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 note section 552.130 does not apply to out-of-state motor vehicle record information. The city must withhold the Texas driver's license number we have marked in the remaining information under section 552.130 of the Government Code.⁴

²The 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).

³We note that if the named individual's social security number is not excepted under section 552.117 of the Government Code, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

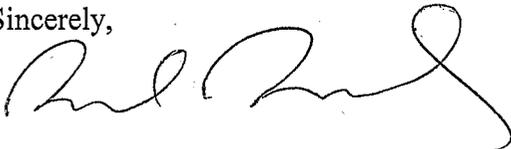
⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the medical records we marked may only be released in accordance with the MPA. If the named individual properly elected to withhold his social security number and home address information, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. The city must withhold the Texas driver's license number we marked under section 552.130 of the Government Code. The city must release 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 400312

Enc. Submitted documents

c: Requestor
(w/o enclosures)