



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 28, 2011

Ms. Michelle M. Fraga  
Assistant County Attorney  
Harris County Attorney's Office  
1019 Congress, 15th Floor  
Houston, Texas 77002

OR2011-01504

Dear Ms. Fraga:

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# 407629 (C.A. File No. 10GEN2657).

The Harris County Constable, Precinct 7 (the "constable") received a request for the personnel files of two named deputies. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.1175, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from 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 other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . , or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Consequently, the constable must withhold the W-4 forms we marked pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such 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). Accordingly, we conclude the submitted I-9 forms and their attachments, which we have marked, are confidential for purposes of section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. *See* 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).

Section 552.101 also encompasses section 1701.306 of the Occupations Code, which provides:

(a) [Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE")] may not issue a license to a person as an officer or county jailer unless the person is examined by:

- (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and
- (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Upon review, we find the constable must withhold the L-2 Declaration of Medical Condition forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." *Id.* § 1703.306(b). Upon review, we find that none of the remaining

information consists of polygraph information. Accordingly, the constable may not withhold any information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* 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. 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Upon review, we conclude the constable must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083 and federal law.

Section 552.101 of the Government Code 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]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). The remaining information contains fingerprints. 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 constable 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 also claim the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163

(Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.101 of the Government Code 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *See id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *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). Upon review, we find that some of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Thus, the constable must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of this information is confidential under section 552.101, and it may not be withheld on that basis.

Section 552.108(a)(2) of the Government Code excepts from required public 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[.]" Gov't Code § 552.108(a)(2). 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 that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Open Records Decision No. 434* at 2-3 (1986). Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. We note section 552.108(a)(2) is not applicable to records of an internal affairs investigation that is purely administrative in nature and did 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.) (section 552.108 not applicable to information police department holds as employer); *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). Upon review, the documents at issue reflect they were generated as part of an internal administrative investigation conducted by the

constable. You do not provide any arguments explaining how the internal investigation resulted in a criminal investigation or prosecution. Accordingly, the constable may not withhold any portion of the submitted information under section 552.108(a)(2) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code.<sup>1</sup> Gov't Code § 552.117(a)(2). Section 552.117(a)(2) is also applicable to a peace officer's cellular telephone number, if the cellular telephone service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(2) exception to personal cellular telephone number and personal pager number of peace officers). We have marked personal information pertaining to peace officers the constable must withhold under section 552.117(a)(2).<sup>2</sup> However, the constable may only withhold the marked cellular telephone numbers if the officers pay for the cellular telephone services with personal funds.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure; [and]

...

(3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]

(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

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<sup>1</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

<sup>2</sup>As our ruling is dispositive for this information, we do not address your remaining argument under section 552.147 of the Government Code against disclosure of portions of this information.

(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), (3), (b). The constable must withhold the information we marked under section 552.1175 to the extent this information relates to peace officers or employees of the Texas Department of Criminal Justice who elect to restrict access to the information in accordance with section 552.1175(b).

Section 552.130 of the Government Code provides that 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.<sup>3</sup> *Id.* § 552.130(a)(1), (2). Upon review, the constable must withhold the Texas motor vehicle record information we have marked under section 552.130.

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(b). This office has determined insurance policy numbers are "access device" numbers for purposes of section 552.136. Upon review, we find the constable must withhold the information we have marked under section 552.136.

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), (b). The constable must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the addresses have affirmatively consented to their release.

Finally, we note that some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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<sup>3</sup>The 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).

In summary, the constable must withhold the following information under section 552.101 of the Government Code: (1) the W-4 forms we have marked in conjunction with section 6103(a) of title 26 of the United States Code; (2) the Form I-9 and attachments we have marked in conjunction with section 1324a of title 8 of the United States Code; (3) the L-2 Declaration of Medical Condition forms we have marked in conjunction with section 1701.306 of the Occupations Code; (4) the CHRI we have marked in conjunction with section 411.083 of the Government Code; and (5) the fingerprints we have marked in conjunction with section 560.003 of the Government Code. The constable must withhold the information we marked under section 552.102(a) of the Government Code. The constable must also withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The constable must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the peace officers' cellular telephone numbers may only be withheld if the officers pay for the cellular telephone services with personal funds. The constable must withhold the information we marked under section 552.1175 of the Government Code to the extent this information relates to peace officers or employees of the Texas Department of Criminal Justice who elect to restrict access to the information in accordance with section 552.1175(b). The constable must withhold the information we have marked under sections 552.130 and 552.136 of the Government Code. The constable must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.<sup>4</sup> The remaining information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

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

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<sup>4</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 direct deposit authorization forms under section 552.101 of the Government Code in conjunction with the common-law right to privacy; a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code; L-2 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code; insurance policy numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a long horizontal flourish extending to the right.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/vb

Ref: ID# 407629

Enc. Submitted documents

c: Requestor  
(w/o enclosures)