



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 4, 2011

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

OR2011-04606

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# 413466.

The McKinney Police Department (the "department") received a request for a specified case number and all employment records, including termination or separation documents, pertaining to a named former officer. You state the department has released some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.117, 552.130, 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 of the Government Code encompasses section 411.083 of the Government Code, which pertains to criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies 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. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information in accordance with chapter 411, subchapter F of the Government Code.¹ *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a)

¹Although you raise section 411.085 of the Government Code, that provision merely provides the penalties for the "Unauthorized Obtaining, Use, or Disclosure of Criminal History Record Information." Gov't Code § 411.085. Section 411.083 is applicable to the dissemination of CHRI.

authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may only release CHRI to another criminal justice agency for a criminal justice purpose. *See 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. Furthermore, 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. However, we note that driving record information 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). We also note that section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Upon review, we conclude the department must withhold the CHRI we marked under section 552.101 in conjunction with section 411.083 and federal law. However, we find no portion of the remaining information constitutes CHRI and none of it may be withheld under section 552.101 in conjunction with chapter 411.

Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code. Section 611.002(a) provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* ORD 565. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find portions of the remaining information consist of mental health records. Accordingly, the department must withhold the mental health records, which we have marked, pursuant to section 552.101 in conjunction with section 611.002(a).

We note the remaining responsive information contains an L-2 Declaration of Medical Condition form and an L-3 Declaration of Psychological and Emotional Health form 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 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.

Occ. Code § 1701.306(a), (b). Upon review, we find the department must withhold the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to TCLEOSE. Section 1701.454 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. The responsive information contains an F-5 (“Report of Separation of Licensee”) report, which does not indicate the officer at issue resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the department must withhold the F-5 report we 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. Section 1703.306 provides as follows:

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

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

(b) The [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.

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

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from public disclosure under common-law privacy. *See Open Records Decision Nos. 600, 545* (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) 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." Gov't Code § 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). 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.

You assert portions of the remaining information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994); *see also* Open Records Decision No. 670 at 6 (2001) (determining that a governmental body may withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision). In this instance, the employee named in the request is no longer employed by the department, and it is unclear whether this person is currently a licensed peace officer as defined by article 2.12. Accordingly, if the former employee at issue is currently a licensed peace officer as defined by article 2.12, then the department must withhold the information we have marked under section 552.117(a)(2).

If the individual whose information is at issue is no longer licensed peace officer, then the personal information at issue may be subject to section 552.117(a)(1) of the Government Code. 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). 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. To the extent the former employee timely requested confidentiality under section 552.024 for his personal information, the department must withhold this information, which we have marked, under section 552.117(a)(1). Conversely, if the individual at issue

did not make a timely election under section 552.024 for his personal information, the department may not withhold the marked personal information under section 552.117(a)(1).²

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 [or] a motor vehicle title or registration issued by an agency of this state." *Id.* § 552.130(a)(1), (2). We note section 552.130 does not apply to out-of-state motor vehicle record information. In this instance, none of the remaining documents contain motor vehicle record information issued by an agency of this state. Accordingly, the department may not withhold any of the remaining information 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."³ *Id.* § 552.136; *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are "access device" numbers for purposes of section 552.136. Accordingly, the department must withhold the insurance policy and bank account numbers we have marked under section 552.136 of the Government Code.

The submitted information also contains personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). Accordingly, the department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the department must withhold pursuant to section 552.101 of the Government Code: (1) the marked CHRI in conjunction with section 411.083 of the Government Code; (2) the marked mental health records in conjunction with section 611.002 of the Health and Safety Code; (3) the L-2 and L-3 declaration forms we marked in conjunction with section 1701.306 of the Occupations Code; (4) the F-5 form we marked in conjunction with section 1701.454; (5) the marked polygraph information in conjunction with section 1703.306 of the Occupations Code; (6) the information we marked in conjunction with common-law privacy. The department must withhold the information we marked under section 552.102 of the Government Code. To the extent the individual at issue is still a

²We note that regardless of the applicability of section 552.117, 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).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

licensed peace officer, the department must withhold the personal information we marked under section 552.117(a)(2) of the Government Code. If the individual at issue is no longer a licensed peace officer, but timely elected confidentiality under section 552.024 of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. The department must also withhold the bank account and insurance policy numbers we marked under section 552.136 of the Government Code. Unless the owners of the e-mail addresses we marked have affirmatively consented to their release, the department must withhold them under section 552.137 of the Government Code.⁴ The department must release the remaining information to the requestor.

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_or1.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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 413466

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; bank account and insurance policy numbers under section 552.136 of the Government Code; and personal 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.