ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2011

Mr. David Daugherty
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-06260

Dear Mr. Daugherty:

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# 416503 (C.A. File No. 11PIA0066).

The Harris County Sheriff's Office (the "sheriff") received a request for the complete personnel file of a named deputy, including any disciplinary records, grievances and statements against the deputy, termination records, investigation records, and all allegations or complaints against the deputy. You state the sheriff has provided some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, 552.140, and 552.147 of the Government Code.[1] 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 section 6103(a) of title 26 of the United States Code, which makes 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[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have

[1] Although you also raise section 552.1175, we note that section 552.117 is the correct exception to raise for information the sheriff hold in its capacity as employer.

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). Upon review, we find the W-4 form we have marked constitutes tax return information subject to section 6103(a). The sheriff must withhold the W-4 form we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the federal Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 *et seq*. Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person who the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See* 15 U.S.C. § 1681b(a)(3)(B); *see also id.* § 1681a(b), (d) (defining "person" and "consumer report"). Section 1681b further provides that "[a] person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." *Id.* § 1681b(f). Section 1681e provides for the maintenance of procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See id.* § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (stating that federal law strictly limits distribution of consumer credit reports by credit reporting agencies). Upon review, we find the information we have marked under the FCRA consists of a consumer report furnished to the sheriff by a consumer agency. The sheriff must withhold this information under section 552.101 of the Government Code in conjunction with the FCRA.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") 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.* at 10–12. 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. Section 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See* Gov't Code § 411.089(b)(1). We note section 411.083 does not apply to active warrant information or other information relating to an individual'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). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Upon review, we find the information we have marked under section 411.083 constitutes

confidential CHRI that may not be released. The sheriff must withhold this information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The sheriff has not demonstrated that any of the remaining information constitutes confidential CHRI. Accordingly, the sheriff may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

We understand the sheriff to assert that the remaining information it obtained from DPS, NCIC, and TCIC is confidential under the doctrine of intergovernmental transfer. This doctrine provides that information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Attorney General Opinion. No. GA-0055 (2003); Open Records Decision Nos. 680 at 7 (2003), 667 at 3–4 (2000). Generally, if confidentiality provisions or another statute specifically authorize release of information under certain circumstances or to particular entities, then the information may be released or transferred only in accordance with the particular statute. *See* Open Records Decision No. 655 (1997) (because statute permitted DPS to transfer confidential criminal history information only to certain entities for certain purposes, county could not obtain information from the department regarding applicants for county employment). However, the intergovernmental transfer doctrine itself does not make information confidential. As previously discussed, none of the remaining information is confidential under chapter 411 of the Government Code. Further, you do not inform our office of another provision or statute under which you have obtained this information. Accordingly, none of the remaining information may be withheld on the basis of intergovernmental transfer.

Section 552.101 also encompasses chapter 560 of the Government Code, which provides a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in the possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information in this instance. Therefore, the sheriff must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

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
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> (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.
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> (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 submitted information does not contain L2 or L3 declaration forms. Accordingly, section 1701.306 is not applicable to any of the remaining information, and no information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which states, "[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[.]"[2] Occ. Code § 1703.306. Upon review, we find the information we have marked is information acquired from a polygraph examination and is within the scope of section 1703.306. The sheriff must withhold this information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001–165.160. Section 159.002 of the MPA provides in relevant 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.

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[2] The 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).

> (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.
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> (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). Upon review, we find the information we have marked constitutes medical records that are subject to the MPA. The sheriff may release these records only in accordance with the MPA. However, none of the remaining information constitutes a medical record subject to the MPA and may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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 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 personal financial information not relating to a financial transaction between an individual and a governmental body, *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). We note this office has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Information relating to a public employee's job performance is not protected by common-law privacy, even though such information could be considered highly intimate or embarrassing. *See Indus. Found.*, 540 S.W.2d 668.

Upon review, we find the information we have marked under common-law privacy is highly intimate or embarrassing and of no legitimate concern to the public. The sheriff must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the sheriff has not demonstrated any of the remaining information is highly intimate and embarrassing and of no legitimate public interest. The sheriff may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

You 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." Gov't Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently disagreed with *Hubert*'s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and 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. *Id.* at *10. Upon review, we have marked the information the sheriff must withhold 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 552.117(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, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117 also applies to a personal cellular telephone number and pager number, provided the cellular telephone or pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5–6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Upon review, we find the sheriff must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, the cellular telephone and pager numbers we have marked may be withheld under section 552.117(a)(2) of the Government Code only if the deputy paid for the service with his own money.[3]

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[3] We note 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. *See* Open Records Decision No. 670 at 6 (2001). As our ruling is dispositive for this information, we do not address your arguments against disclosure under section 552.147 of the Government Code.

Section 552.130 excepts from disclosure information related 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. *See* Gov't Code § 552.130(a)(1), (2). The sheriff must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the information we have marked under section 552.136 consists of a bank account number and a bank routing number. The sheriff must withhold this information under section 552.136 of the Government Code.

Section 552.140 provides, in part:

> (a) This section applies only to a military veteran's Department of Defense Form DD-214 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.

Gov't Code § 552.140(a). Section 552.140 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 be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a)–(b). We note that section 552.140 applies to only the DD-214 form itself or other military discharge records and not references to the form or records. You state the sheriff came into possession of the submitted DD-214 form in 2008 when the deputy at issue submitted it as part of an application for employment. Based on this representation, we conclude the sheriff must withhold the submitted DD-214 form, which we have marked, pursuant to section 552.140 of the Government Code. However, none of the remaining information may be withheld under section 552.140 of the Government Code.

In summary, the sheriff must withhold the following information under section 552.101 of the Government Code: the W-4 form we have marked in conjunction with section 6103(a) of title 26 of the United States Code; the consumer report we have marked in conjunction with the FCRA; the CHRI we have marked in conjunction with section 411.083 of the Government Code; the fingerprints we have marked in conjunction with section 560.003 of the Government Code; the polygraph information we have marked in conjunction with section 1703.306 of the Occupations Code; and the information we have marked in conjunction with common-law privacy. The sheriff may release the marked medical records only in accordance with the MPA. The sheriff must withhold the information we have marked under section 552.102(a) of the Government Code; the information we have marked under section 552.117(a)(2) of the Government Code, provided the cellular telephone service

and pager service was paid for with the deputy's own money; the Texas motor vehicle record information we have marked under section 552.130 of the Government Code; the bank account and bank routing numbers we have marked under section 552.136 of the Government Code; and the DD-214 form we have marked under section 552.140 of the Government Code.[4] 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, 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,

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/bs

Ref: ID# 416503

Enc. Submitted documents

c: Requestor
w/o enclosures)

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[4] We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code, a bank account number and bank routing number under section 552.136 of the Government Code, and a DD-214 form that is first recorded or first comes into possession of a governmental body after September 1, 2003, under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.