



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2011

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
For City of Wylie
P.O. Box 1210
Mckinney, Texas 75070-1210

OR2011-07480

Dear Ms. Brewer:

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# 418806.

The City of Wylie (the "city"), which you represent, received a request for the requestor's entire employee file. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your argument under section 552.108 of the Government Code, as this is potentially the most encompassing exception you claim. Section 552.108 provides as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an

investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Generally, sections 552.108(a)(2) and (b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in 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 that the governmental body seeks to withhold. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

As a general rule, section 552.108 is not applicable to a law enforcement agency's personnel records and internal affairs investigations. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) not applicable to documents obtained by police department for purpose of evaluating applicant's fitness for employment), *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); Open Records Decision Nos. 562 at 10 (1990) (statutory predecessor to section 552.108(b) not applicable to employment information in police officer's file). You generally assert the submitted information, including the submitted internal affairs investigation, is subject to section 552.108 because it deals with an investigation that did not result in conviction or deferred adjudication. However, you provide no explanation for how the submitted personnel file, which is purely administrative in nature, relates to a criminal case such that release of the personnel file would interfere with that case. Accordingly, we find you have failed to demonstrate how any of the submitted information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Thus, none of the submitted information may be withheld under section 552.108 of the Government Code.

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. This exception encompasses information that other statutes make confidential. You claim that some of the submitted information consists of confidential criminal record information ("CHRI"). Section 552.101 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 the Texas 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. 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. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Upon review, we find portions of the submitted information constitute confidential CHRI. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. However, we find that no portion of the remaining information includes CHRI. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See Occ. Code* § 159.001. 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). This office has concluded that 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 none of the remaining information constitutes a medical record for purposes of the MPA. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 611.002(a) of the Health and Safety Code, which 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 a portion of the submitted information, which we have marked, consists of communications or records made confidential by section 611.002 and may only be released in accordance with sections 611.004 and 611.0045. However, upon review, we find none of the remaining information consists of communications or records made confidential by section 611.002 of the Health and Safety Code. Therefore, none of the remaining information may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. *See* Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

When asserting section 772.118, section 772.218, or section 772.318 of the Health and Safety Code, a governmental body must indicate whether it is part of a 9-1-1 district subject to that section, and whether the originating addresses and telephone numbers of the 9-1-1 callers were supplied by a 9-1-1 service supplier to that 9-1-1 district. *See* Gov’t Code § 552.301(e). Furthermore, the 9-1-1 callers should be identified in the submitted information. In this instance, you do not indicate that the City of Wylie is part of a 9-1-1 district established under section 772.118, section 772.218, or section 772.318 of the Health and Safety Code. Nor do you identify the remaining information, if any, that relates to

a 9-1-1 caller. Accordingly, we must rule conditionally. Therefore, to the extent the addresses and telephone numbers in the remaining information are addresses and telephone numbers of 9-1-1 callers that were supplied by a 9-1-1 service supplier to a 9-1-1 district, any such address or telephone number must be withheld from disclosure under section 552.101 of the Government Code in conjunction with chapter 772 of the Health and Safety Code. However, addresses and telephone numbers that were not provided by a 9-1-1 service supplier to the 9-1-1 district are not confidential under chapter 772 and may not be withheld under section 552.101.

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

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] 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 the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The city must withhold the L-3 Declaration of Psychological and Emotional Health form we have marked under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

We note the submitted information also contains a F-5 ("Report of Separation of Licensee") report. Section 552.101 also encompasses section 1701.454 of the Occupations Code, which provides as follows:

(a) A report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] 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 [Texas Commission on Law Enforcement Officer Standards and Education] member or other person may not release the contents of a report or statement submitted under this subchapter.

Id. § 1701.454. The F-5 report 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 city must withhold the F-5 report we marked pursuant to section 552.101 in conjunction with section 1701.454 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. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Additionally, this office has found 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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Moreover, a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Determinations under common-law privacy must be made on a case-by-case basis. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); Open Records Decision No. 373 at 4 (1983). However, information relating to routine traffic violations is not excepted from release under common-law privacy. *Cf. Gov't Code* § 411.082(2)(B) (criminal history record information does not include driving record information).

Upon review, we find that portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Thus, the city 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 any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of this information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim some of the remaining information is excepted under section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, registration, or personal identification document issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the city must withhold the information we have marked under section 552.130 of the Government Code. Furthermore, we note the requestor has a right of access to his own Texas motor vehicle record information, and the city may not withhold it under section 552.130. *See id.* § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests).

You claim some of the remaining information is subject to section 552.136 of the Government Code, which provides 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); *see also id.* § 552.136(a) (defining "access device"). However, you have not explained, and we cannot discern, how any of the remaining information contains a credit card, debit card, or charge card number or can be used to obtain money, goods, services, or another thing of value or initiate a transfer of funds. Thus, we find none of the remaining information constitutes information that must be withheld under section 552.136 of the Government Code, and the city may not withhold any of the remaining information on that basis.

We note the remaining information contains a personal e-mail address that is subject to section 552.137 of the Government Code.¹ Section 552.137 provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). We have marked the e-mail address that is not of the type specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the address affirmatively consents to its disclosure.²

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

¹The 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).

²We 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 L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. To the extent the addresses and telephone numbers in the submitted information are addresses and telephone numbers of a 9-1-1 caller that were supplied by a 9-1-1 service supplier to a 9-1-1 district, any such address or telephone number must be withheld from disclosure under section 552.101 of the Government Code in conjunction with chapter 772 of the Health and Safety Code. The city may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The city must withhold the L-3 Declaration of Psychological and Emotional Health form we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, the F-5 report we have marked pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code, the information we have marked under section 552.101 in conjunction with common-law privacy, as well as the information we have marked under section 552.130 of the Government Code. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of this address affirmatively consents to its release. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.³

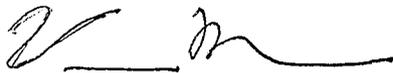
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

³We note the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023. Thus, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office. We further note the information being released contains social security numbers. 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. *Id.* § 552.147(b). However, because section 552.147 is based on the principles of privacy, the requestor has a right of access to his own social security number. See *id.* 552.023(b).

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 'Vanessa Burgess', with a horizontal line underneath.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 418806

Enc. Submitted documents

c: Requestor
(w/o enclosures)