



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2011

Ms. Carol I. Freeman
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2011-07557

Dear Ms. Freeman:

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# 418912 (File No. 3957-1; PIR #03-11-11).

The City of Seabrook (the "city"), which you represent, received a request for personnel information relating to a named city police officer. You state some of the requested information has been released. You claim other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.1175, 552.130, 552.136, 552.137, 552.140, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

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 section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires that information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined medical

information for purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Although you contend some of the information at issue is confidential under the ADA, we find you have not demonstrated any of the information falls within the scope of the federal law. *See Ballard v. Healthsouth Corp.*, 147 F. Supp. 2d 529, 534 (N.D. Tex. 2001) (information not confidential under ADA when not obtained by an employer as a result of job-related medical examination); *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp.2d 789, 801-02 (E.D. Va. 2006) (information not confidential as medical information under ADA if not obtained as part of employee health program or from medical examinations conducted at employer's direction). We therefore conclude the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the ADA.

Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under section 552.101 of the Government Code in conjunction with federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). We note the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety (the "DPS") under subchapter C of chapter 521 of the Transportation Code. *See id.* § 411.082(2). We also note a criminal justice agency may disclose to the public CHRI "that is related to the offense for which a person is involved in the criminal justice system." *Id.* § 411.081(b). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). The federal regulations allow each state to follow its own individual law with respect to CHRI it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with the federal law and subchapter F of chapter 411 of the Government Code. Although you seek to withhold other information on this basis, we conclude none of the remaining information at issue is confidential under section 552.101 in conjunction with the federal law or subchapter F of chapter 411 of the Government Code.

Mental health records are confidential under section 611.002 of the Health and Safety Code, which provides in part:

- (a) Communications 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.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). The city must withhold the mental health record we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain the information under sections 611.004 and 611.0045. Although you appear to claim section 611.002 encompasses other information, we conclude the city may not withhold any other information under section 552.101 on that basis.

You also claim section 552.101 in conjunction with sections 1701.306 and 1701.454 of the Occupations Code. Section 1701.306 provides in part:

- (a) The [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) (emphasis added). The city must withhold the declarations we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 1701.454 of the Occupations Code provides as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], 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. Although you contend section 1701.454 is applicable in this instance, we find none of the submitted information falls within the scope of this section. We therefore conclude the city may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 1701.454 of the Occupations Code.

Information acquired from a polygraph examination is confidential under section 1703.306 of the Occupations Code, which provides in part:

(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[.]

Id. § 1703.306(a). We have marked information acquired from a polygraph examination the city must withhold under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. Although you appear to claim other information is confidential under this section, we conclude the city may not withhold any other information under section 552.101 on the basis of section 1701.306.

Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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.

Id. § 159.002(b)-(c). Although you seek to withhold some of the information at issue on this basis, we conclude the MPA is not applicable to any of the submitted information. We therefore conclude the city may not withhold any of the information at issue on the basis of the MPA.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have concluded a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States 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). We note criminal history information obtained by a law enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest. We also note information relating to routine traffic violations does not implicate privacy concerns. *Cf. Gov't Code* § 411.081(b).

This office also has determined common-law privacy encompasses certain types of personal financial information. Financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and

basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

We note the submitted information pertains to a peace officer employed by the city's police department. As this office has stated on many occasions, the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs). We find the medical and personal financial information we have marked is highly intimate or embarrassing and not a matter of legitimate public interest. The city must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy. Although you seek to withhold other information on privacy grounds, we conclude the city may not withhold any other information under section 552.101 on that basis.

Section 552.102(a) of the Government Code exempts 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) exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). We have marked information the city must withhold under section 552.102(a) of the Government Code.

You also contend some of the submitted information is confidential under section 552.114 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ Section 552.114(a) exempts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note these provisions are applicable only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). Neither the city nor its police department is an educational institution. *See*

¹We note you also raise section 552.026 of the Government Code, which is not an exception to disclosure under subchapter C of the Act. Section 552.026 incorporates FERPA into the Act. *See* Gov't Code § 552.026.

Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an “educational agency” for purposes of FERPA). You do not inform us, and it does not otherwise appear from our review, that either the city or its police department received any of the submitted information directly from an educational institution. We therefore conclude the city may not withhold any of the submitted information on the basis of section 552.114 of the Government Code or FERPA.

Section 552.115 of the Government Code excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov’t Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See* Open Records Decision No. 338 (1982). In this instance, the city maintains the birth certificate contained in the submitted information. We therefore conclude the city may not withhold the submitted birth certificate under section 552.115 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the officer complies with sections 552.024 or 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) protects a peace officer’s personal cellular telephone number if the officer pays for the cellular telephone service with his personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov’t Code § 552.117(a)(2) excepts from disclosure peace officer’s cell phone or pager number if officer pays for cell phone or pager service); *but see* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials’ and employees’ private vehicles and intended for official business). We have marked information the city must withhold under section 552.117(a)(2) of the Government Code.² Although you claim other information is protected by this exception, we conclude the city may not withhold any other information under section 552.117(a)(2).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state. *See* Gov’t Code § 552.130(a)(1). The city must withhold the Texas driver’s license information we have marked under section 552.130 of the Government Code. Although you claim other information is protected by this exception, we conclude the city may not withhold any other information under section 552.130. We note you also cite to sections 521.045 and 521.046 of the Transportation Code, which are applicable only to the disclosure of information by the DPS. *See* Transp. Code § 521.001(a)(1) (defining “department” for purposes of Transp.

²As we are able to make this determination, we need not address your claim under section 552.1175 of the Government Code.

Code ch. 521). Therefore, because the submitted information is maintained by the city or its police department and not the DPS, sections 521.045 or 521.046 are not applicable in this instance, and the city may not withhold any of the submitted information on the basis of either of those sections.

Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

Gov't Code § 552.136. Although you claim section 552.136, you have not demonstrated any of the submitted information falls within the scope of this exception. We therefore conclude the city may not withhold any of the submitted information under section 552.136 of the Government Code.

Section 552.137 of the Government Code states that "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 public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Although you claim section 552.137, you have not demonstrated any of the submitted information falls within the scope of this exception. We therefore conclude the city may not withhold any of the submitted information under section 552.137 of the Government Code.

Section 552.140 of the Government Code 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.

Id. § 552.140(a). In this instance, the submitted Form DD-214 appears to have been first recorded with or otherwise obtained by the city prior to September 1, 2003. We therefore conclude the city may not withhold the submitted Form DD-214 under section 552.140 of the Government Code.

Section 552.147 of the Government Code provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act.³ *Id.* § 552.147(a). The city may withhold the remaining social security numbers at issue under section 552.147 of the Government Code.⁴

In summary, the city must withhold (1) the marked CHRI under section 552.101 of the Government Code in conjunction with the federal law and subchapter F of chapter 411 of the Government Code; (2) the marked mental health record under section 552.101 in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain the information under sections 611.004 and 611.0045; (3) the marked declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; (4) the marked information acquired from a polygraph examination under section 552.101 in conjunction with section 1703.306 of the Occupations Code; (5) the information we have marked under section 552.101 in conjunction with common-law privacy; (6) the information we have marked under section 552.102(a) of the Government Code; (6) the information we have marked under section 552.117(a)(2) of the Government Code; and (7) the marked Texas driver’s license information under section 552.130 of the Government Code. The city may withhold the remaining social security numbers at issue under section 552.147 of the Government Code.⁵ The city must release the rest of the 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.

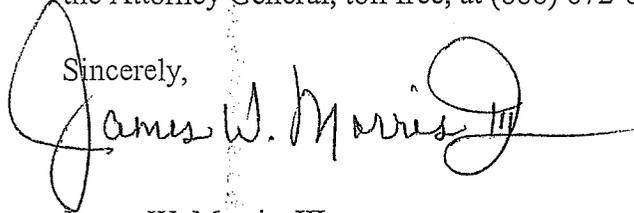
³We note section 552.147(b) authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

⁴As we are able to make this determination, we need not address your other claim for the remaining social security numbers under section 552.101 of the Government Code.

⁵We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code and a Texas driver’s license number under section 552.130 of the Government Code.

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,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in black ink and includes a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 418912

Enc: Submitted documents

c: Requestor
(w/o enclosures)