



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2011

Mr. John Peter Lund
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2011-11492

Dear Mr. Lund:

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# 426432.

The Lancaster Independent School District (the "district"), which you represent, received a request for any internal investigations, questioning, or reviews conducted by the district's police department ("the department") or conducted by any agent of the district, including the Lancaster Police Department, related to any disciplinary action taken against any department employee between a specified time period, including but not limited to any memoranda, investigative documents, investigative reports, any transcribed or written statements, audio or video recordings, disciplinary documents, counseling documents, and any correspondence related to any investigation in any manner. You state some responsive information has been released. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of completed investigations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't

¹Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information the district holds in its capacity as an employer.

Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold this information under section 552.103. However, sections 552.101 and 552.117 of the Government Code constitute "other law" for purposes of section 552.022. In addition, some of the information is subject to sections 552.102, 552.130, and 552.136 of the Government Code, which are also "other law" for the purposes of section 552.022.² Therefore, we will consider the applicability of these exceptions to the information that is subject to section 552.022, as well as the remaining information. We will also consider your claim under section 552.103 for the information that is not subject to section 552.022.

We now turn to your claim under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides in part the following:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex.*

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Legal Found., 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation representing, that the district is involved in a discrimination lawsuit, styled *Cornish v. Lancaster ISD, et al.*, Case No. 3:10-CV-0797-D, which was filed by a department employee against the district and a number of current and former district employees, and the suit is currently pending in the United States District Court for the Northern District of Texas. You further assert, and provide documentation representing, that a former department employee has filed a petition for review with the Texas Commissioner of Education, styled *Samuel L. Allen v. Lancaster ISD*, Cause No. 001-R2-00108, challenging the district's decision to terminate his employment. Based on the submitted information, we conclude both cases were filed before the district received the present request. Accordingly, we agree litigation to which the district is a party was pending on the date the district received the present request. Further, we find the information not subject to section 552.022(a)(1), which we have marked, is related to the pending litigation. Thus, we conclude the district may withhold this marked information under section 552.103 of the Government Code.³

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

The information subject to section 552.022(a)(1) contains medical records that are subject to the Medical Practice Act (the "MPA"). 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 section encompasses 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 pertinent 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.

³As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

(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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. We have marked the documents in the remaining information that constitute medical records, and thus must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

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 (“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.

Occ. Code § 1701.454. The F-5 report we have marked does not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the district 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 section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”). 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 (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 that the Texas Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI 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). We note active warrant information or other information relating to an individual’s current involvement in the criminal justice system does not constitute criminal history information for the purposes of section 552.101. *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 information we have marked consists of CHRI generated by the NCIC or the TCIC. Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find a portion of the remaining information was used or developed in an investigation of alleged or suspected child abuse, so as to fall within the scope of section 261.201(a). *See id.* § 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). In addition, portions of the remaining information reveal the identity of an individual who made a report of alleged or suspected child abuse. As you do not indicate that the department has adopted a rule that governs the release of this type of information, we assume that no such regulation exists. Given that assumption, and based on our review, we determine the information we have marked is confidential pursuant to sections 261.201(a)(1) and 261.201(a)(2) of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).* Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, we find you have failed to demonstrate how any of the remaining information constitutes information that was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Law enforcement records relating to juvenile conduct, whether delinquent conduct or conduct in need of supervision, that occurred on or after September 1, 1997, are confidential under section 58.007 of the Family Code. *See id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for

purposes of title 3 of the Family Code). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). Section 58.007(c) does not apply to law enforcement records that relate to a juvenile only as a complainant, victim, witness, or other involved party; rather the juvenile must be involved as a suspect, offender, or defendant. Although the remaining information contains references to juvenile delinquent conduct, the information does not consist of law enforcement records and files concerning a juvenile offender, but rather consists of internal administrative investigations. The records of administrative investigations do not constitute juvenile law enforcement records for purposes of section 58.007. We therefore conclude the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The type of information considered intimate and 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. *Id.* at 683. This office has found 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. 343 (1982), 455 (1987). This office has also found that common-law privacy generally protects the identifying information of juvenile offenders and juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code §§ 58.007, 261.201. We have marked the information that the district must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government

Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)); *see* Open Records Decision No. 622 (1994). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. 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. Open Records Decision No. 670 at 6 (2001); *cf.* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the district must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The district must withhold the marked cellular telephone number only if the peace officer pays for the cellular telephone service with personal funds.⁴ Although you also argue the officers' names and badge numbers are excepted under section 552.117, we note that section 552.117 only makes the current and former home addresses, telephone numbers, emergency contact information, social security numbers, and family member information of a peace officer confidential. Accordingly, section 552.117 does not apply to the officers' names and badge numbers, and they may not be withheld on that basis.

To the extent the information pertains to an individual who is no longer a licensed peace officer or a district employee, section 552.117(a)(1) of the Government Code may be applicable. Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). We note a post office box number is not a "home address" for purposes of section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district must withhold the information we have marked under section 552.117(a)(1) only if the individuals at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made; however, the district may only withhold the marked cellular telephone number if the service is paid for with personal funds. If the individuals did not

⁴We note the previous determination issued in Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).

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 another state or country and information related to a motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Accordingly, the district must withhold the driver's license numbers, class designation, and expiration date we have marked under section 552.130 of the Government Code.

We note the remaining information contains bank account and bank routing numbers. Section 552.136 of the Government Code states, "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(b); *see also id.* § 552.136(a) (defining "access device"). Upon review, we find the district must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code.⁵

In summary: (1) the district may withhold the information we have marked under section 552.103 of the Government Code; (2) the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA; (3) the district must withhold the F-5 report we marked pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code; (4) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code; (5) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (6) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (7) the district must withhold the information we have marked under section 552.102(a) of the Government Code; (8) to the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the district must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the district must withhold the marked cellular telephone number only if the peace officer pays for the cellular telephone service with personal funds; (9) the district must withhold the information we have marked under section 552.117(a)(1) only if the individuals elected confidentiality under section 552.024 prior to the date on which the request for this

⁵We 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 a Texas driver's license number under section 552.130 of the Government Code and bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

information was made; however, the district may only withhold the marked cellular telephone number if the cellular telephone service is paid with personal funds; (10) the district must withhold the driver's license numbers, class designation, and expiration date we have marked under section 552.130 of the Government Code; and (11) the district must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code. 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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 426432

Enc. Submitted documents

c: Requestor
(w/o enclosures)