



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 12, 2011

Ms. Sylvia McClellan
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 S. Lamar
Dallas, Texas 75215

OR2011-11663

Dear Ms. McClellan:

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# 426801 (DPD PIR# 2011-4476).

The Dallas Police Department (the "department") received a request for all employment records and oral or verbal disciplinary actions regarding a named officer. You claim the marked portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). While you raised sections 552.101, 552.117, 552.130, 552.136, and 552.137 of the Government Code within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.102 of the Government Code until after the ten-business-day deadline had passed. Thus, the department failed to comply with the requirements of section 552.301(b) with respect to its claim under section 552.102.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.102 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this section. We will also consider the applicability of the other exceptions you raised.

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 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 Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 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 subchapter F of chapter 411 of the Government Code. We note section 411.083 does not apply to active warrant information or other information related to one's current involvement with the criminal justice system. *See*

id. § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). You have marked information that you assert constitutes CHRI. Upon review, we agree most of this information consists of CHRI that is confidential under chapter 411 and federal law. Accordingly, except for the information we marked for release, the department must withhold the information you marked, as well as the information we have marked, under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

Section 552.101 of the Government Code also encompasses 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"). 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 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; ORD 565. Upon review, we agree the information you marked is a mental health record that is confidential under section 611.002. Thus, the department must withhold this information under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.²

You raise section 552.117 of the Government Code for a portion of the submitted information. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.³ 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)(2)). We note section 552.117 does encompass personal cellular

²As our ruling for this information is dispositive, we need not address your claim under section 415.057 of the Health and Safety Code, except to note this section was repealed by the 76th Legislature. *See* Act of May 13, 1999, 76th Leg., R.S. ch. 388, § 6(b)(1), 1999 Tex. Gen. Laws 1430, 2440. Section 1701.306 of the Occupations Code is the current statute covering this type of information.

³"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Upon review, we find the department must withhold the information you marked, except as we have marked for release, under section 552.117(a)(2) of the Government Code. The department must also withhold the additional information we have marked under section 552.117(a)(2).⁴

Section 552.101 of the Government Code 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. 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) (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). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We note, however, there is a legitimate public interest in an applicant's background and qualifications for governmental employment, especially where the applicant is seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow). We also note driving record information is not criminal record history information. *Cf. Gov't Code* § 411.081(2)(B) (definition of criminal record history information does not include driving record information).

You have marked the information you assert is criminal history information protected by common-law privacy. We note the information you have marked that pertains to the named officer does not consist of criminal history information. Furthermore, although the submitted information does contain the officer's criminal history information, this information was obtained by the department in the process of hiring the officer. Therefore, we find there is a legitimate public interest in this information and the department may not withhold it under section 552.101 in conjunction with common-law privacy. You have also marked criminal history information belonging to individuals other than the named officer. We note, however, most of these individuals' identities are being withheld under

⁴As our ruling for this information is dispositive, we need not address your claim under section 552.147 of the Government Code.

section 552.117 of the Government Code. Therefore, the privacy interests of these individuals are sufficiently protected and the department may not withhold their criminal history information. However, the department must withhold the criminal history information of the remaining individual, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

We also note this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision No. 545 (1990). The remaining information contains the financial information of individuals not employed by the department. We find this information to be of no legitimate public concern. Accordingly, the department must also withhold the financial information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains the named officer's birth date, which you seek to withhold under section 552.102 of the Government Code. Section 552.102 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. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the department must withhold the marked birth date under section 552.102(a) of the Government Code.

You also raise section 552.130 of the Government Code. This section provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. 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(a)(1), (2)). Therefore, the department must withhold the driver's license information you marked, as well as the information we marked, under section 552.130 of the Government Code.

You seek to withhold an employee's locker combination and an employee identification number pursuant to section 552.136 of the Government Code. This section 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). An access device number is one that 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, and includes an account number. See *id* § 552.136(a). You inform us an employee's identification number is used in conjunction with one additional digit to access the employee's bank account. We therefore agree the employee identification number is an access device number subject to section 552.136. We also agree the employee locker combination is a confidential access

device number pursuant to section 552.136. Thus, we find the department must withhold the employee identification number and employee locker combination, which you have marked, under section 552.136 of the Government Code.

Finally, the remaining information includes the officer's personal e-mail address. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the email address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address is not specifically excluded by section 552.137(c). As such, the e-mail address you marked must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release.⁵ *See id.* § 552.137(b).

In summary, except for the information we marked for release, the department must withhold the information you marked, as well as the information we have marked, under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. The department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code. With the exception of the information we have marked for release, the department must withhold the information you marked, and the additional information we marked, under section 552.117(a)(2) of the Government Code. The department must withhold the criminal history and financial information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the marked birth date under section 552.102(a) of the Government Code. The department must withhold the driver's license information you marked, as well as the information we marked, under section 552.130 of the Government Code. The department must withhold the information you marked under sections 552.136 and 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. 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,

⁵This 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, a copy of a Texas driver's license, and a Texas license plate number under section 552.130 of the Government Code, and the 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.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 426801

Enc. Submitted documents

c: Requestor
(w/o enclosures)