



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2011

Mr. Warren Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2011-13118

Dear Mr. Ernst:

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# 429505.

The City of Dallas (the "city") received a request for the personnel records of a named firefighter. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 1304(b) of title 8 of the United States Code, which addresses the confidentiality of records of the registration of aliens under section 1301 of the United States Code. Section 1304(b) provides:

(b) Confidential Nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

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.

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Upon review, we find the alien registration information in Exhibit G you have marked is confidential under title 8, section 1304(b) of the United States Code and must be withheld under section 552.101 of the Government Code on that basis.²

Section 552.101 also encompasses chapter 411 of the Government Code, which deems confidential criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or the Texas Crime Information Center (“TCIC”). 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). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI 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 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. We note information relating to routine traffic violations is not excepted from release under section 552.101 of the Government Code on this basis. *Cf. id.* § 411.082(2)(B). We also note that because the laws governing the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Upon review, we agree a portion of the information in Exhibit D, which we have marked, constitutes CHRI generated by NCIC or TCIC. Accordingly, the city must withhold this information under section 552.101 in conjunction with section 411.083 of the Government Code and federal law. However, you have not demonstrated how any of the remaining information in Exhibit D is confidential under section 411.083, and the city may not withhold it on this basis.

Section 552.101 also encompasses section 560.003 of the Government Code, which provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We note the fingerprints in Exhibit E you seek to withhold belong to a deceased individual. Laws making this type of information confidential are intended to protect an individual’s privacy. *See id.* Because the right of privacy is purely personal and lapses at death, the fingerprints of a deceased individual may not be withheld on the basis of sections 560.001, 560.002, and 560.003. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ.

²As our ruling is dispositive, we need not address your argument against disclosure of this information.

App.—Texarkana 1979, writ ref'd n.r.e.) (right of privacy is purely personal and lapses upon death); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-67 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Therefore, the city may not withhold the fingerprints in Exhibit E under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 159.002(b), (c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we have marked in Exhibit B constitutes medical records subject to the MPA. Thus, the city must withhold these records in accordance with the MPA. However, none of the remaining information in Exhibit B constitutes a medical record subject to the MPA, and the city may not withhold any of the remaining information on that basis.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(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;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;

- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306(a). You claim Exhibit C is excepted under section 1703.306. You do not indicate the requestor falls into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Upon review, we find some of the information in Exhibit C, which we have marked, was acquired from a polygraph examination and is, therefore, within the scope of section 1703.306. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. You have failed to demonstrate, however, how the remaining information in Exhibit C was acquired from a polygraph examination. Thus, the city may not withhold this information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the 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 satisfied. *Id.* at 681-82. 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. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, we note privacy is a personal right that lapses at death, and, thus, common-law privacy is not applicable to information that relates only to a deceased individual. *See Moore*, 589 S.W.2d 489; *Justice*, 472 F. Supp. 145; JM-229; H-917; ORD 272.

The remaining information primarily pertains to the deceased firefighter named in the request and includes information pertaining to the firefighter's designated beneficiary. Generally, we find the designation of a beneficiary is a private, financial decision excepted from disclosure under common-law privacy pursuant to section 552.101. In this instance, however, we note the information pertains to an individual who is deceased. As previously noted, the right to privacy lapses at death. *See Moore* 589 S.W.2d at 491. Thus, that individual's right to privacy has lapsed, and the information relating to him may not be withheld on that basis. However, the beneficiary has a separate right to privacy. Therefore,

information that would reveal a beneficiary's identity is protected by common-law privacy. Thus, the city must withhold the information in Exhibit F that reveals a beneficiary's identity, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, the city may not withhold any of the remaining information in Exhibit F under section 552.101 on the basis of common-law privacy.

You claim portions of the remaining information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, we note section 552.102(a) protects the privacy interests of individuals, and, as noted above, the right to privacy lapses at death. *See Moore*, 587 S.W.2d at 491. Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code, and the city may not withhold any of the remaining information on that basis.

Section 552.117(a)(1) of the Government Code 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)). As noted above, the employee whose personal information is at issue is deceased. Because the protection afforded by section 552.117 includes "current or former" officials or employees, we note the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. We note, however, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the employee, it lapses at death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229; H-917. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5* (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The submitted documents include an election form. We note the election form permitted the employee at issue to request confidentiality for his home address, home telephone number, and social security number. However, the election form provided no means for the employee to request that his family member information or emergency contact information be withheld from disclosure under section 552.117(a)(1). The submitted election form shows the individual at issue timely elected to keep his home address, home telephone number, and social security number confidential. Therefore, the city must withhold the deceased employee's home address and home telephone number you have marked, and the additional home address and home telephone number we have marked, under section 552.117(a)(1) of the Government Code. However, the city may not withhold the deceased employee's social security number, family member information, or emergency contact information under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency, or 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)). However, section 552.130 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. The information you have marked under section 552.130 relates to the deceased individual. Accordingly, the city may not withhold this information section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states “[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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). You have marked an employee identification number under section 552.136 of the Government Code. You inform us this number is used as part of an employee's City of Dallas credit union account. However, section 552.136 protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Therefore, if the employee identification number you have marked is associated with a credit union account that belonged solely to the deceased individual, it is not excepted from disclosure under section 552.136, and the city may not withhold it on that basis. However, to the extent a living individual has an interest in the employee's credit union account, the city must withhold the employee identification number you have marked under section 552.136 of the Government Code.

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 e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note the purpose of section 552.137 is to protect the privacy interests of individuals, and because the right of privacy lapses at death, the e-mail address of a deceased individual may not be withheld under section 552.137. *See Moore*, 589 S.W.2d at 497. Therefore, the city may not withhold the deceased individual's e-mail address you have marked under section 552.137 of the Government Code.

In summary, the city must withhold the alien registration information you have marked in Exhibit G under section 552.101 of the Government Code in conjunction with title 8, section 1304(b) of the United States Code. The city must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The city must withhold the medical records we have marked in Exhibit B under section 552.101 of the Government Code in accordance with the MPA. The city must withhold the information acquired from a polygraph examination we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the home address and home telephone number you have marked, and the additional information

we have marked, under section 552.117(a)(1) of the Government Code. To the extent a living individual has an interest in the employee's credit union account, the city must withhold the employee identification number you have marked under section 552.136 of the Government Code. The city must release the remaining 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.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 429505

Enc. Submitted documents

c: Requestor
(w/o enclosures)