



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2011

Mr. Randall P. Gunter
For the City of Liberty
Fielder & Gunter
301 Main Street
Liberty, Texas 77575

OR2011-13829

Dear Mr. Gunter:

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# 431474.

The Liberty Police Department (the "department") received a request for any files, including the personnel file, for a named former department officer. You state the department has released some requested information to the requestor. You claim the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

First, we note you redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the information is subject to a previous determination issued by this office or to a specific provision of law that expressly allows for the redaction of information without the necessity of requesting a decision. *See* Gov't Code § 552.301(a), (e)(1)(D). The redacted information includes the named officer's home address, social security number, emergency contact information, and wage scales. Although the department is authorized to redact the former officer's social security number, home address, and emergency contact information without requesting a decision from this office, the requestor in this instance is the named officer's authorized representative. Accordingly, as the authorized representative of the officer, the requestor has

a right of access to this information and it must be released. *See id.* § 552.023(a) (“a person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.”). You do not assert, nor does our review of the records indicate, that you have been authorized to withhold the redacted wage scales without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the redacted wage information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the department must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination or the department is authorized by statute to do so. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See Gov’t Code* § 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. You contend release of the submitted information is prohibited by the department’s settlement agreement with the named officer, which was mediated, drafted, and facilitated by the Equal Employment Opportunity Commission (the “EEOC”). However, a governmental body’s promise to keep information confidential, including in a settlement agreement or any other contract, is not a basis for excepting information from required public disclosure under the Act unless the governmental body has express statutory authority to make such a promise. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In this instance, you have not directed our attention to, nor does the settlement agreement reference, any state or federal statute authorizing the EEOC or the department to make information confidential by law. *See Gov’t Code* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Thus, the department has failed to demonstrate how the settlement agreement at issue constitutes “law” for purpose of section 552.101 of the Government Code. *See id.* § 552.101. Therefore, none of the submitted information may be withheld on that basis.

Section 552.101 of the Government Code encompasses information made confidential by statutes. We note the submitted information includes medical records, which are subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 151.001-165.160. Section 159.002 of the MPA provides, in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has concluded 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 have marked the medical records in the submitted information, which pertain to the named officer.

Medical records must be released upon the patient's signed, written consent, provided 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. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). In this instance, the requestor has provided an authorization signed by the officer for disclosure of the requested information. Consequently, if the department determines the requestor has provided proper consent in accordance with the MPA, it must release the submitted medical records. If the department determines the requestor has not provided proper consent, it must withhold the submitted medical records under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, 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 chapter 411, subchapter F. Upon review, we find a portion of the submitted information, which we have marked, constitutes CHRI that the department must withhold under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

We also note the remaining information includes a federal I-9 form. Section 552.101 also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form, which we have marked, is confidential pursuant to section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note portions of the submitted information may be subject to section 552.1175 of the Government Code.¹ Section 552.1175 applies to, among other things, employees of a district attorney. Gov’t Code § 552.1175(a)(5). Section 552.1175(b) provides:

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual’s choice on a form provided by the governmental body, accompanied by evidence of the individual’s status.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov’t Code § 552.1175(b)). The department must withhold information we have marked under section 552.1175 of the Government Code if it relates to a district attorney employee who elects to restrict access to the information in accordance with section 552.1175(b). However, if the individual to whom the information pertains is not longer an employee of

¹The 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).

a district attorney or does not elect to restrict access to his information, the department may not withhold the information we have marked under section 552.1175.

The submitted information also contains a driver's license number of an individual other than the named officer, which is subject to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit 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(a)(1)). You must withhold the driver's license number we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136; *see id.* § 552.136(a) (defining "access device"). The submitted information contains bank account numbers and credit or debit card numbers of an individual other than the named officer that are subject to section 552.136. The department must withhold these marked numbers under section 552.136.

The submitted information also contains an e-mail address obtained from a member of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the owner of the e-mail address we marked has affirmatively consented to the release of her e-mail address. The department must, therefore, withhold the e-mail address we marked under section 552.137.²

²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

In summary, the medical records we marked must be released in accordance with the MPA. The department must withhold the information we marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must withhold the marked I-9 form pursuant to section 6103 of title 26 of the United States Code. The department must withhold the information we marked under section 552.1175 of the Government Code if it relates to a district attorney employee who elects to restrict access to the information in accordance with section 552.1175(b). The department must withhold the information we marked under sections 552.130, 552.136, and 552.137 of the Government Code. The remaining information must be released.³

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/agn

Ref: ID# 431474

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Some of the information at issue would generally be protected by laws and exceptions enacted to protect the officer's privacy. However, as the authorized representative of the officer, the requestor has a right of access to this information. Thus, the department must again seek a decision from this office if it receives a request for this information from a different requestor.