



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2011

Ms. Erin A. Higginbotham
Denton, Navarro, Rocha & Bernal
2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2011-15794

Dear Ms. Higginbotham:

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# 434338.

The City of Copperas Cove (the "city"), which you represent, received a request for the personnel file of a former city police officer. You state the city is withholding the following information pursuant to the previous determination this office issued in Open Records Decision No. 684 (2009): direct deposit authorization forms under section 552.101 of the Government Code in conjunction with the common-law right to privacy; L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code; Texas driver's license and license plate numbers under section 552.130; credit card, debit card, charge card, insurance policy, bank account, and bank routing numbers under section 552.136; and e-mail addresses of members of the public under section 552.137.¹ You

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general opinion, including Texas driver's license and license plate numbers under section 552.130 of the Government Code and credit card, debit card, charge card, insurance policy, bank account, and bank routing numbers under section 552.136 of the Government Code. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)); Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov't Code § 552.136(c)). If a governmental body redacts information described in subsections 552.130(a)(1) and (a)(3), it must notify the requestor in accordance with section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(d), (e)). In addition, if a governmental body redacts

claim some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked some of the submitted information as nonresponsive because it does not pertain to the former employee. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information in response to this request.

We next note the submitted information contains documents filed with the court. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is confidential under other law. *See* Gov't Code § 552.022(a)(17). Information that has been filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54, 58 (Tex. 1992) (common-law privacy not applicable to court-filed document). Thus, the city may not withhold any information in the court-filed documents pursuant to common-law privacy. However, sections 552.117, 552.1175, and 552.130 of the Government Code constitute other law for purposes of section 552.022(a)(17).² Thus, we will address the applicability of these sections to the information subject to section 552.022(a)(17), as well as the remaining documents.

Section 552.101 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 information protected by other statutes, including the Americans with Disabilities Act of 1990 (the “ADA”). *See* 42 U.S.C. §§ 12101 *et seq.* The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996).

information described in subsection 552.136(b), it must notify the requestor in accordance with section 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov't Code § 552.136(d), (e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1), 552.130(a)(3), and 552.136(b) in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA.

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). 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. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and that the city may only release in accordance with the MPA.

Section 552.101 also encompasses section 550.065 of the Transportation Code. The submitted information contains CR-3 accident report forms that were completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) states that except as provided by subsection (c) or (e), accident reports are privileged and confidential. *See id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The requestor has not provided the city with two of the three pieces of information. Thus, the city must withhold these accident reports, which we have marked, under section 550.065(b). However, we find you have not established the remaining information contains accident reports that were completed pursuant to chapter 550. Thus, the city may not withhold any of the remaining information pursuant to section 550.065.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law

Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information 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 information submitted under this subchapter.

Act of May 23, 2011, 82nd Leg., R.S., S.B. 545, § 4 (to be codified as an amendment to Occ. Code § 1701.454). The submitted information contains F-5 Separation of Licensee forms of the former employee there was submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. The submitted F-5 forms do not reflect the former employee was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the submitted F-5 forms under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 also encompasses common-law privacy. Common-law privacy protects information that (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). The types of information considered intimate or 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 the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexually-related offenses, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

In addition, in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the

Ellen court held “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. The summary is, thus, not confidential under common-law privacy and *Ellen*. However, information within the summary identifying the victim and a witness, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The city must withhold the remaining information in the investigation, which we have also marked, under section 552.101 in conjunction with common-law privacy. *See id.*

You also assert portions of an investigation into an alleged improper relationship between the former employee and a private citizen are confidential under common-law privacy and *Ellen*. However, these documents do not relate to an investigation of an allegation of sexual harassment in an employment context. Therefore, the city may not withhold any of the remaining information under common-law privacy on the basis of *Ellen*. Nevertheless, we find some of this information, as well as information in the remaining documents, highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

You also claim some of the submitted information is 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). 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 information at issue, the city must withhold the information we have marked in the remaining information under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

You assert some of the remaining information is excepted from disclosure under section 552.117 of the Government Code.³ Section 552.117(a)(1) 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 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)). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. *Id.* 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)). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use).

We have marked information pertaining to two former department officers under section 552.117. If the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Texas Code of Criminal Procedure, then the city must withhold this information under section 552.117(a)(2). To the extent the individuals are not currently licensed peace officers as defined by article 2.12, then the city must withhold this information under section 552.117(a)(1) if the individuals requested that this information be kept confidential under section 552.024 of the Government Code before the city received the request for information. However, the city may only withhold under section 552.117 the personal cellular telephone number we have marked if the officer at issue paid for the cellular telephone service. *See* Open Records Decision Nos. 670 at 6 (2001). The remaining information does not contain the home address, home telephone number, emergency contact information, social security number, or family member information of a current or former city official, employee, or peace officer. Therefore, the city may not withhold any of the remaining information under section 552.117.

You assert some of the remaining information is protected by section 552.1175 of the Government Code. Section 552.1175(b) provides the following:

³Although the submitted information contains an authorization for release of personal information that the former employee submitted to the city in 2006, which appears to relate to an employment application with the City of Killeen, there is no indication the requestor is the former employee's authorized representative for purposes of section 552.023 of the Government Code. *See* Gov't Code § 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”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves).

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 submitted documents contain information pertaining to an officer who does not work for the department. If this individual is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold the information, which we have marked, under section 552.1175. However, the department may not withhold this information under section 552.1175 if the individual either is not a currently licensed peace officer or he does not elect to restrict access to this information in accordance with section 552.1175(b). Upon review, we find you have not established section 552.1175 is applicable to any of the remaining information. Thus, the city may not withhold any of the remaining information on that basis.

Some of the remaining information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130(a) provides the following:

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;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

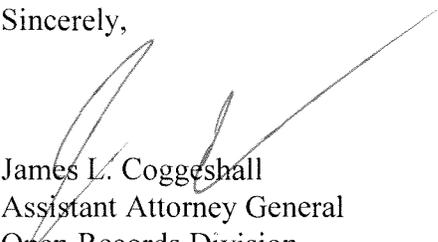
Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The city must withhold the motor vehicle record information we have marked under section 552.130.

To conclude, the city may only release the medical records we have marked in accordance with the MPA. The city must withhold the following information: the information we have marked under section 552.101 of the Government Code in conjunction with the ADA, section 550.065 of the Transportation Code, and common-law privacy; the information you have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code; and the information we have marked under section 552.102 of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code if the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Texas Code of Criminal Procedure. To the extent the individuals are not currently licensed peace officers as defined by article 2.12, then the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individuals requested that this information be kept confidential under section 552.024 of the Government Code before the city received the request for information. However, the city may only withhold the personal cellular telephone number we have marked under section 552.117 if the officer at issue paid for the cellular telephone service. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual at issue is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b). The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The city must release the remaining information. As our ruling is dispositive, we do not address your other arguments to withhold the information at issue.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 434338

Enc. Submitted documents

c: Requestor
(w/o enclosures)