



ATTORNEY GENERAL OF TEXAS
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December 30, 2011

Ms. Lisa D. Mares
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OR2011-19194

Dear Ms. Mares:

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# 440688.

The City of Azle (the "city"), which you represent, received a request for information concerning the vetting process of the city's police chief, the disciplinary and complaint history of the police chief, and the criteria used to evaluate applicants for the position of police chief. You state some information will be released to the requestor. You state the city will redact information as permitted by Open Records Decision Nos. 684 (2009)¹ and 670

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code, e-mail addresses of members of the public under section 552.137 of the Government Code, direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy, W-2 and W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, and L-2 and L-3 declarations under section 552.101 in conjunction with section 1701.306 of the Occupations Code, without the necessity of requesting an attorney general decision.

(2001)² and sections 552.024,³ 552.136,⁴ and 552.147⁵ of the Government Code. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.1175, and 552.130 of the Government Code.⁶ We have considered the claimed exceptions and reviewed the submitted information, a portion of which is a representative sample.⁷

Initially, we note, and you acknowledge, the city did not raise section 552.102 within the statutory deadline imposed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b). 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 that the information at issue is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.*

²Open Records Decision No. 670 is a previous determination to all governmental bodies authorizing them to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of their peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

³Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

⁴Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

⁵Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See id.* § 552.147(b).

⁶We note you also raise section 552.101 in conjunction with section 1701.454 of the Government Code. However, you have not indicated any information you seek to withhold under that section, nor did we find any information subject to that section upon review. Accordingly, this ruling does not address your argument under that section. You also raise section 552.117 of the Government Code; however, we note section 552.1175 is the proper exception to raise for information the city does not hold in its capacity as an employer. Finally, although you also raise section 552.119 of the Government Code, we note you have not submitted any photographs of a peace officer. Therefore, this ruling will not address that exception.

⁷We 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.

§ 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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because section 552.102 can provide a compelling reason to withhold information, we will address its applicability, as well as your timely-raised claims.

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 information made confidential by other statutes. Access to medical records is governed by 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). 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). Upon review, we find the information we have marked in Exhibit B/G consists of records of the identity, diagnosis,

evaluation, or treatment of a patient by a physician that were created by a physician. Therefore, the information we have marked in Exhibit B/G constitutes confidential medical records and may be released only in accordance with the MPA.⁸

You raise section 1701.306 of the Occupations Code for the remaining information in Exhibit B/G, which is also encompassed by section 552.101 of the Government Code. Section 1701.306 makes confidential L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”). Section 1701.306 provides:

(a) [TCLEOSE] may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). The remaining information consists of authorization forms for pre-employment drug screening. This information is not made confidential under section 1701.306 and may not be withheld under section 552.101 on that basis.

You assert Exhibit D is protected by chapter 411 of the Government Code, which is also encompassed by section 552.101 of the Government Code. Chapter 411 pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). 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 laws with respect to the CHRI it

⁸Because our ruling as to this information is dispositive, we do not address your arguments against its disclosure.

generates. *See 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. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find Exhibit D does not constitute CHRI for purposes of chapter 411 of the Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

You argue Exhibit F is protected by section 58.007 of the Family Code, which is also encompassed by section 552.101 of the Government Code.⁹ Section 58.007 protects juvenile law enforcement records related to delinquent conduct and conduct indicating a need for supervision that occurred on or after September 1, 1997. Section 58.007 provides, in relevant part:

(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). For purposes of section 58.007(c), a “child” is a person who was ten years of age or older and under seventeen years of age at the time the conduct occurred.

⁹We note the first page of what is labeled Exhibit F appears to actually be the last page of Exhibit D/G. Thus, this page will be included in our discussion of Exhibit D/G.

Id. § 51.02(2). You seek to withhold internal administrative records that reference juvenile delinquent conduct. However, the administrative records do not consist of law enforcement records and files. Thus, the internal administrative records do not constitute juvenile law enforcement records for purposes of section 58.007 and may not be withheld under section 552.101 of the Government Code on that basis.

You assert portions of Exhibits D/G and E are protected by common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy 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 met. *Id.* at 681-82. We note home addresses and telephone numbers of individuals are generally not protected by common-law privacy under section 552.101. *See* Open Records Decision Nos. 554 at 3 (1990) (public disclosure of an individual's home address and telephone number is not an invasion of privacy), 455 at 7 (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). This office has found that personal financial information not related to a financial transaction between an individual and a governmental body ordinarily satisfies the first element of the common-law privacy test. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found information regarding receipt of governmental funds or debts owed to governmental entities is not excepted from public disclosure by common-law privacy), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983). In addition, this office has determined common-law privacy protects the identifying information of juvenile offenders. *See* Open Records Decision No. 384 (1983); *cf.* Fam. Code § 58.007. We find the information we have marked in Exhibit D/G is highly intimate or embarrassing and of no legitimate public interest. The city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information you seek to withhold in Exhibits D/G and E is highly intimate or embarrassing and of no legitimate public interest, and it may not be withheld under section 552.101 on that basis. In addition, we note portions of Exhibit F, which we have marked, are highly intimate or embarrassing and of no legitimate public interest, and must be withheld under section 552.101 in conjunction with common-law privacy.

You argue portions of Exhibits B/G and D/G are protected by section 552.102 in conjunction with the ruling in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which was discussed above. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller*, 2010 WL 4910163, at *5. The supreme court then considered the applicability of section 552.102, not *Industrial Foundation*, and 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. *Id.* at *10. Having carefully reviewed the information at issue, we have marked information in Exhibits B/G, C, and D/G that must be withheld 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 ask whether certain information in Exhibit E concerning out-of-state peace officers must be withheld under the Act. Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov’t Code § 552.1175(b). Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure.” *Id.* § 552.1175(a)(1). You do not indicate, nor does it appear, that the out-of-state peace officers qualify as peace officers under this definition. Therefore, the city may not withhold any portion of Exhibit E under section 552.1175.

You state you will redact motor vehicle record information as permitted by section 552.130(c) of the Government Code and Open Records Decision No. 684 (2009). Section 552.130(c) authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information described in subsections 552.130(a)(1) and (a)(3). *See id.* § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.130(c) to attorney general, and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor). Open Records Decision No. 684 permits a governmental body to redact Texas license plate numbers, which are made confidential by section 552.130(a)(2), without requesting an attorney general decision. However, we note any other information made confidential by section 552.130(a)(2) is not subject to section 552.130(c) or Open Records Decision No. 684 and, therefore, may not be withheld without requesting a decision from this office. Thus, in addition to the information the city will redact under section 552.130(c), the city must withhold the information we have marked under section 552.130(a)(2) of the Government Code.

In summary, the city may release the information we marked in Exhibit B/G only in accordance with the MPA. The city must withhold the information we marked in Exhibits D/G and F under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we marked in Exhibits B/G, C, and D/G under section 552.102 of the Government Code and in Exhibit D/G under section 552.130(a)(2) of the Government Code. The remaining information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 440688

Enc. Submitted documents

c: Requestor
(w/o enclosures)