



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2012

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam, L.L.P.
6000 Western Place, Suite 200
I-30 at Bryant Irvin Road
Fort Worth, Texas 76107

OR2012-05411

Dear Ms. White:

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# 450696.

The City of Crowley (the "city"), which you represent, received four requests from the same requestor for the personnel files of four named individuals. You state you will redact certain information pursuant to Open Records Decision No. 684 (2009)¹ and sections 552.130²

¹This office issued Open Records Decision No. 684, 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, without the necessity of requesting an attorney general decision.

²Section 552.130(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a motor vehicle operator's or driver's license or permit issued by an agency of this state, or another state or country, and 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. Gov't Code § 552.130(c) (governmental body may redact information described by subsections 552.130(a)(1) and (3) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* (entitling requestor to appeal governmental body's decision to withhold information pursuant to section 552.130(c) to attorney general); *id.* (requiring governmental body that withholds information pursuant to section 552.130(c) to provide notice to requestor).

and 552.136³ of the Government Code. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 exception 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:

(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). This office also has concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). The submitted information contains medical records and information that has been directly obtained from medical records. Such information may be disclosed only in accordance with the MPA. *See* Occ. Code §§ 159.002, .004; ORD Nos. 598, 546 (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Upon review, we find the information we have marked is subject to the MPA and conclude that the city may only

³Section 552.136(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a credit card, debit card, charge card, or access device number. Gov’t Code § 552.136(c) (governmental body may redact information described by subsection 552.136(b) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* (entitling requestor to appeal governmental body’s decision to withhold information pursuant to section 552.136(c) to attorney general); *id.* (requiring governmental body that withholds information pursuant to section 552.136(c) to provide notice to requestor).

release this information in accordance with the MPA. However, we find that you have failed to demonstrate that any of the remaining information consists of medical records for the purposes of the MPA and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code 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 Chapter 552, Government Code, 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.

Occ. Code § 1701.454. You assert the information you have marked in Exhibit B is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. In this instance, the officer at issue did not resign due to substantiated incidents of excessive force or violations of the law other than traffic offenses. We, therefore, conclude the city must withhold the submitted F-5 form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. You also seek to withhold an L-1 form and a Photo License Identification Application pursuant to section 1701.454. However, L-1 forms and Photo License Identification Applications are not required to be filed with TCLEOSE pursuant to subchapter J of chapter 1701. Therefore, the L-1 form and Photo License Identification Application may not be withheld under section 552.101 in conjunction with section 1701.454 of the Occupations Code. The city may not withhold any of the remaining information under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides in relevant part:

(a) The [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 the commission. A declaration is not public information.

Id. § 1701.306(a), (b). The submitted information contains a Declaration of Psychological and Emotional Health. This declaration, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

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[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Id. § 1703.306(a), (b). The submitted information contains information acquired from a polygraph examination. The requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, the city must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, we find you have failed to demonstrate how any of the remaining information you seek to withhold was acquired from a polygraph examination. Accordingly, the city may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The type of information considered intimate and 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 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 No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989). We note the scope of a public employee's privacy is narrow. *See* Open Records Decision No. 423 at 2 (1984). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how the remaining information is highly intimate and embarrassing and not of legitimate public interest. Accordingly, no portion of the information of the remaining information is subject to common-law privacy, and the city may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted 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 is noted above. *See Indus. Found.*, 540 S.W.2d at 685. 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 Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court 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. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102, 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. *See id.* at 346. Accordingly, the city must withhold the dates of birth in the remaining information, which we have marked, under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to 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)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number

of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We further note section 552.117(a)(2) is not applicable to a former spouse and does not protect the fact that a governmental employee has been divorced. In this instance, you do not inform us whether the individuals whose information we have marked are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, if the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Conversely, if an individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12, then the city may not withhold the marked information under section 552.117(a)(2).

If an individual whose information is at issue is no longer a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, if an individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12 and the individual timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individual at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1) of the Government Code.

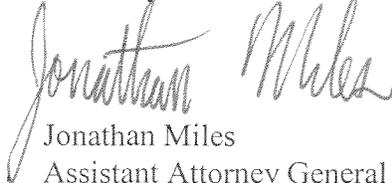
In summary, the information we have marked can only be released in accordance with the MPA. The city must withhold the submitted F-5 form, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold the Declaration of Psychological and Emotional

Health we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The city must withhold the polygraph information we have marked 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 under section 552.101 of the Government Code in conjunction with common-law privacy. If the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If an individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12 and the individual timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). 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, 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,

A handwritten signature in cursive script that reads "Jonathan Miles".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 450696

Enc. Submitted documents

c: Requestor
(w/o enclosures)