



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2012

Mr. John Schneider
First Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501

OR2012-05534

Dear Mr. Schneider:

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# 451051.

The Pasadena Police Department (the "department") received a request for all documents related to the requestor's application for employment as a Pasadena police cadet. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we address the department's assertion that the requestor has waived his right to see the submitted information pursuant to the agreement he signed when he submitted his application. A governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990)* ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."). You have not identified any law that authorizes the department to enter into an agreement with the requestor to keep any of the submitted information confidential. Therefore, the department must release the submitted information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Next, we note the department did not fully comply with section 552.301 of the Government Code. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish the date of receipt; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). While the department timely raised and explained the applicability of sections 552.101, 552.102, and 552.111 of the Government Code, the department did not raise section 552.137 or explain its applicability until after its fifteen-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at n.4 (2001) (mandatory exceptions). Because section 552.137 of the Government Code is a mandatory exception that can provide a compelling reason for non-disclosure under section 552.302, we will consider the applicability of this exception along with sections 552.101, 552.102, and 552.111.

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 other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs access to medical records. *See* Occ. Code §§ 151.001-165.160. 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.

Id. § 159.002(b), (c). Information that is 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 determined 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 (1988), 370 (1983), 343 (1982). Pursuant to the MPA, medical records must be released upon the patient's signed,

written consent, provided that 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. *See* 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 constitutes the requestor's medical records. The department must withhold this information under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code unless it receives written consent for the release of the record that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 of the Government Code also encompasses information section 1703.306 of the Occupations Code, which provides in part:

(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[.]

Occ. Code § 1703.306. A portion of the submitted information, which we have marked, consists of records of a polygraph examination of the requestor. Section 1703.306(a) makes this polygraph information confidential. However, the department has the discretion to release the polygraph information to the requestor, as the examinee, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). Otherwise, the department must withhold this information under section 552.101 in conjunction with section 1703.306(a). However, none of the remaining information constitutes polygraph information that is confidential under section 1703.306 of the Occupations Code. Therefore, none of the remaining information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses the common-law right of 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 demonstrated. *See id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. Although you raise common-law privacy for portions of the remaining information, we note the information pertains to the requestor. Section 552.023 of the Government Code states a person or a person's authorized representative has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); ORD 481 at 4 (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Thus, the requestor has a right of access to his own private information pursuant to section 552.023, and the department may not withhold any portion of the remaining information from this requestor under section 552.101 of the Government Code on the basis of common-law privacy.

You claim some of the remaining 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. 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. 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. Upon review, we find no portion of the remaining information is excepted under section 552.102(a). Accordingly, the department may not withhold any of the remaining information under this section.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, opinions,

recommendations and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

You assert a portion of the remaining information should be protected under section 552.111. However, we note the information at issue pertains to a personnel matter concerning only the individual at issue. You have not demonstrated how this information involves policymaking pertaining to personnel matters of a broad scope. Therefore, the department may not withhold any of the information at issue under section 552.111 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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. Except as we have marked for release, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

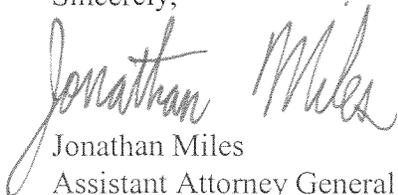
In summary, the department may only release the marked medical records if it receives proper consent pursuant to the MPA. The department may withhold the polygraph information under section 552.101 in conjunction with section 1703.306(a), but has the discretion to release it to the requestor. Except as we have marked for release, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining information must be released.¹

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.

¹We note some of the information being released contains information to which the requestor has a special right of access. *See* Gov't Code § 552.023(a). Because the requestor has a right of access to this information that would be confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

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". The signature is written in black ink and is positioned above the typed name and title.

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 451051

Enc. Submitted documents

c: Requestor
(w/o enclosures)