



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Mr. Timothy B. Kirwin
Randle Law Office Ltd., L.L.P.
820 Gessner, Suite 1570
Houston, Texas 77024-4494

OR2012-07576

Dear Mr. Kirwin:

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# 454146.

The City of Fulshear (the "city"), which you represent, received a request for the personnel records for the past two years of officers involved in a specified incident. You state you will release some of the requested information, with information redacted pursuant to section 552.130 of the Government Code.¹ You state you will withhold the responsive L-2 and L-3 declarations pursuant to Open Records Decision No. 684 (2009).² We note the city has redacted information pursuant to Open Records Decision No. 670 (2001), which is a previous determination by this office authorizing a governmental body to redact information

¹Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) of the Government Code without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). We note section 552.130 does not protect the state of issuance of a driver's license, and such information may not be withheld on that basis.

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, without the necessity of requesting an attorney general decision.

subject to section 552.117(a)(2) of the Government Code.³ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.1175 of the Government Code.⁴ 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. Section 552.101 encompasses information protected by other statutes, such as section 1701.454 of the Occupations Code, which governs the public availability of information submitted to 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.

Occ. Code § 1701.454. The submitted information contains a F-5 Report of Separation of Licensee report. The F-5 report states the officer at issue resigned or was terminated for reasons other than substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, 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. However, you have not established any of the remaining information consists of reports or statements submitted to TCLEOSE under section 1701.454 of the Occupations Code. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA provides in relevant 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

³Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6.

⁴You 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 employer.

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 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 that 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 at 2 (1987), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find the medical records we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code, which pertains to 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 that state agencies obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information in accordance with 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 only release CHRI to another criminal justice agency for a criminal justice purpose. *See 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 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find none of the remaining information consists of CHRI for purposes of chapter 411; thus, the city may not withhold any of the remaining information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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. *See 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 satisfied. *Id.* at 681-82. The type 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 that some kinds of medical information or information indicated disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include choice of particular insurance carrier), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Although references to the previous salaries of an applicant for public employment may be considered highly intimate or embarrassing, we find there is a legitimate public interest in this information as it pertains to the applicant's employment qualifications and background. *See* Open Records Decision No. 455 at 9 (1987) (applicant salary information is of legitimate public interest because it "bears on the applicants' past employment record and their suitability for the employment position in question"). Further, some of the information you seek to withhold under common-law privacy pertains to the named officer's criminal history. This office has found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 (scope of public employee privacy is narrow). In this instance, the criminal history information you seek to withhold pertains to a police officer, not a private citizen. Because the officer's compiled criminal history information at issue was gathered in the course of the officer's pre-employment screening, there is a legitimate public interest in the information. Upon review, we agree a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated the remaining information is highly intimate or embarrassing and not a matter of legitimate public interest. Accordingly, no portion of the remaining information you marked 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(a) of the Government Code 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 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., 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the dates of birth which you have marked, and the additional date of birth we have marked, under section 552.102(a) of the Government Code.

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. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Some of the remaining information may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(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.

Id. § 552.1175(a)(1), (b). Some of the remaining information, which we have marked, relates to peace officers who are employed by other police departments. Accordingly, to the extent any of the officers at issue elect to restrict access to their marked information in accordance with section 552.1175(b), the city must withhold the marked information that pertains to that officer under section 552.1175 of the Government Code. Conversely, if any of the officers at issue do not elect to restrict access to their information in accordance with section 552.1175(b), the marked information pertaining to that officer may not be withheld under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130(a)(1)-(2). Accordingly, the city

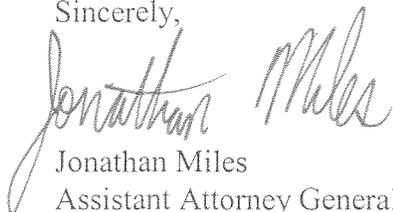
must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the city must withhold the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The medical records we have marked may only be released in accordance with the MPA. The city must withhold the information we have marked under 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the dates of birth you have marked, and the additional date of birth we have marked, under section 552.102(a) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. To the extent any of the officers at issue elect to restrict access to the information we have marked in accordance with section 552.1175(b) of the Government Code, the city must withhold the marked information that pertains to that officer under section 552.1175 of the Government Code. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 454146

Enc. Submitted documents

c: Requestor
(w/o enclosures)