



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2012

Ms. Julia Gannaway
Lynn Ross Smith & Gannaway, LLP
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2012-09873

Dear Ms. Gannaway:

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# 457496.

The City of Weatherford (the "city"), which you represent, received a request for information pertaining to veterinarians, veterinarian job postings, other employment positions, rabies control, and a named employee at a specified animal shelter. You state the city has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.¹

Initially, you contend, and we agree, the request asks the city to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990), 555 at 102. You state the city has made a good-faith effort to do so. Accordingly, we will address your claimed exceptions for the submitted information.

Next, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-08715 (2012). In Open Records Letter No. 2012-08715, we ruled the following: (1) the city may only release the medical and mental health records we marked in accordance with the MPA and chapter 611, respectively; (2) the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.102 of the Government Code; (3) the city must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual to whom the information pertains timely elected to keep such information confidential; and (4) the city must release the remaining information. We have no indication that the law, facts, or circumstances on which the prior ruling were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in the prior ruling, the city must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter No. 2012-08715. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information is not encompassed by Open Records Letter No. 2012-08715, we will address your arguments against its release.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which pertains to medical records. *See* Occ. Code §§ 151.001-168.202. 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.

Id. § 159.002(b), (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. Section 159.002(c) also requires that 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 medical records that are subject to the MPA. The city 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 records that complies with sections 159.004 and 159.005 of the MPA.²

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; ORD 565. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004-.0045. Upon review, we find the information we have marked constitutes mental health records that are confidential under section 611.002 of the Health and Safety Code. The city must withhold the marked mental health records unless it receives consent for their release in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.³

²As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

³As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

Section 552.101 also encompasses common-law privacy, which 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has also 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 Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.,* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982). We find the information we have marked is highly intimate or embarrassing information and of no legitimate public concern. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ However, we find the remaining information consists of information in which there is a legitimate public interest or information that is not highly intimate or embarrassing. Therefore, the city may not withhold any of the remaining information on the basis of section 552.101 of the Government Code in conjunction with common-law privacy.

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 of the Government Code. *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 v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and held section 552.102(a) excepts from

⁴As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 347-48. Upon review, we find the city must withhold the information 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), and the city may not withhold any of the remaining information on that basis.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who timely request this information be kept confidential under section 552.024 of the Government Code.⁵ Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which request for this information was made. We note post office boxes are not home addresses and are not protected under section 552.117(a)(1). *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home). The remaining information contains information subject to section 552.117 of the Government Code, which we have marked. To the extent the employee to whom the information relates timely elected to keep such information confidential, the city must withhold the information we have marked under section 552.117 of the Government Code.⁶

Section 552.136 of the Government Code provides, in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

⁶In the event the named employee's social security number is not excepted from disclosure under section 552.117 of the Government Code, we note section 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 a decision from this office under the Act. Gov't Code § 552.147(b).

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136(a)-(b). You assert the information you have marked in Exhibit C is subject to section 552.136 and generally state the information you have marked constitutes account numbers by which the city obtains goods. Upon review, we conclude the city must withhold the purchase card account number and card access number we have marked under section 552.136 of the Government Code. However, we find you have not explained how any of the remaining information you have marked consists of an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 to the remaining information and the city may not withhold any of the remaining information you have marked on this ground.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in the prior ruling, the city must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with Open Records Letter No. 2012-08715. To the extent the submitted information is not encompassed by Open Records Letter No. 2012-08715, the city: (1) may only release the medical and mental health records we have marked in accordance with the MPA and chapter 611 of the Health and Safety Code, respectively; (2) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) must withhold the information we have marked under section 552.102 of the Government Code; (4) must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individual to whom the information pertains timely elected to keep such information confidential; and (5) must withhold the information we have marked under section 552.136 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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 457496

Enc. Submitted documents

c: Requestor
(w/o enclosures)