



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2012

Ms. Myrna Reingold
Galveston County Legal Department
County Courthouse
722 Moody, 5th Floor
Galveston, TX 77550-2317

OR2012-10816

Dear Ms. Reingold:

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# 458601.

The Galveston County Sheriff's Office (the "sheriff's office") received a request for the personnel file of a named deputy. You state the sheriff's office has released some of the requested documents to the requestor. You state the sheriff's office will redact some of the requested information, including some of the information you submitted, in accordance with section 552.147 of the Government Code and Open Records Decision Nos. 670 (2001) and 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.130, 552.137, and 552.140

¹See Gov't Code § 552.147(b) (governmental body may redact social security number without necessity of requesting decision from this office under the Act); ORD 684 (authorizing governmental bodies to withhold certain categories of information, including a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision), 670 (authorizing governmental bodies to withhold certain personal information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting attorney general decision).

of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have submitted information that does not pertain to the named deputy. Thus, this information, which we have marked, is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the sheriff's office is not required to release such information in response to this request.

Next, we must address the sheriff's office's obligations under section 552.301 of the Government Code. You acknowledge the sheriff's office did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. See Gov't Code § 552.301(a)-(b). We note the sheriff's office also failed to comply with its fifteen-business-day deadline under section 552.301(e) of the Government Code. See *id.* § 552.301(e). Pursuant to section 552.302 of the Government Code, the submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the submitted information. See *id.* § 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 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). In general, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Because sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.130, and 552.140 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to 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 section 1701.306 of the Occupations Code, which provides in relevant part:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”)] may not issue a license to a person as an officer or county jailer 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

²Although you also raise section 552.1175 of the Government Code as an exception to disclosure, we note section 552.117 is the proper exception to assert for information the sheriff's office holds in an employment capacity.

(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 physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer 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.

Occ. Code § 1701.306(a)-(b). You state you will withhold the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms you have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code pursuant to Open Records Decision No. 684.³ You also ask whether the attachment to the L-3 form is confidential pursuant to section 1701.306 and whether you may withhold the attachment pursuant to Open Records Decision No. 684. We note the language of section 1701.306 only provides for the confidentiality of the declaration. *See id.* § 1701.306(b); *see also* Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection). Accordingly, the attachment to the L-3 form is not made confidential by section 1701.306 and may not be withheld under section 552.101 on that basis. Furthermore, Open Record Decision No. 684 does not authorize the withholding of this information. *See* ORD 684 at 7.

Section 552.101 also encompasses section 611.002(a) 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* Open Records Decision No. 565 (1990). 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. The responsive information contains a mental health record, which we have marked. Accordingly, the

³ORD 684 also authorizes all governmental bodies to withhold 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.

sheriff's office must withhold the marked mental health record under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁴

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 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. Upon review, however, we find none of the remaining information consists of an F-5 form. Therefore, the sheriff's office 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 chapter 411 of the Government Code, which makes confidential 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. ORD 565 at 7. The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one's current involvement with the criminal justice system. *See* Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. *Id.* § 411.082(2)(B). Accordingly, the sheriff's office must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. However, none of the remaining information at issue consists of CHRI and may not be withheld under section 552.101 on the basis of federal law or subchapter F of chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of 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. *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. *Id.* at 681-82. The types 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). 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 No. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we conclude portions of the submitted information are highly intimate or embarrassing and of no legitimate public concern. Thus, the sheriff's office must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, none of the remaining information you have marked is highly intimate or embarrassing and a matter of no legitimate public concern. We therefore conclude the sheriff's office may not withhold any of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

You also claim section 552.102(a) of the Government Code, which 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, which is discussed 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 court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. The Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), however, and held the privacy standard under section 552.102(a) 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 also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Having carefully reviewed the information at issue, we find the information we have marked must be withheld under section 552.102(a) of the Government Code. However, we find none of the remaining responsive information is subject to section 552.102(a) of the Government Code, and it may not be withheld on that basis.

Section 552.114(a) of the Government Code excepts from disclosure student records “at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). You contend some of the remaining information is confidential under section 552.114. However, the sheriff’s office is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an “educational agency” for purposes of FERPA). Nor do you inform us, and it does not otherwise appear from our review, that the sheriff’s office received any of the information at issue directly from an educational institution. We therefore conclude the sheriff’s office may not withhold any of the information at issue on the basis of section 552.114 of the Government Code or FERPA.

Section 552.115(a) of the Government Code provides “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Gov’t Code § 552.115. Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. We note the submitted information does not contain a birth or death record. We further note the sheriff’s office is not the Bureau of Vital Statistics or a local registration official. Therefore, the sheriff’s office may not withhold any of the remaining responsive information under section 552.115. *See* Open Records Decision No. 338 (1982).

As noted above, you state the sheriff’s office will redact the information you have marked under section 552.117(a)(2) of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 670. However, you failed to mark additional portions of the responsive information that are subject to

section 552.117(a)(2). Therefore, we will address the applicability of section 552.117 to the remaining responsive information. Section 552.117(a)(2) excepts from 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 officer has family members, regardless of whether the officer complies with section 552.024 or section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Accordingly, we conclude the sheriff's office must withhold the information we have marked under section 552.117(a)(2).

Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license, title, or registration, issued by an agency of this state or another state or country. *Id.* § 552.130(a)(1)-(2). Accordingly, the sheriff's office must withhold the information marked under section 552.130 of the Government Code. We note, however, the issuing state of a driver's license is not motor vehicle record information for purposes of section 552.130. Thus, the sheriff's office may not withhold the issuing state you have marked under section 552.130, which we have marked for release.

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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). We note the e-mail address you have marked falls under subsection 552.137(c). Therefore, the sheriff's office may not withhold the marked e-mail address under section 552.137 and it must be released.

Section 552.140 of the Government Code provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a)-(b). We note that section 552.140 applies to only the DD-214 form itself or other military discharge records and not references to the form or records. Based on the submitted information, it appears the sheriff's office came into possession of the submitted military discharge record after September 1, 2003. Accordingly, we conclude the sheriff's office must withhold the military discharge record you have marked under section 552.140 of the Government Code.

Finally, as noted above, you state the sheriff's office will redact the social security numbers you have marked under section 552.147 of the Government Code. However, we note you

have marked an entire social security card under section 552.147. Section 552.147(a) of the Government Code provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147(a). Accordingly, the sheriff’s office may withhold the social security number contained in the social security card under section 552.147. However, the remaining portions of the social security card are not excepted under section 552.147 of the Government Code and may not be withheld on that basis. As no further exceptions are raised, the remaining portions of the social security card must be released.

In summary, the sheriff’s office must withhold: (1) the marked mental health record under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (2) the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code; (3) the information we have marked under section 552.101 in conjunction with common-law privacy; (4) the information we have marked under section 552.102(a) of the Government Code; (5) the information we have marked under section 552.117(a)(2) of the Government Code; (6) except where we have marked for release, the information marked under section 552.130 of the Government Code; and (7) the military discharge record you have marked under section 552.140 of the Government Code. The remaining responsive 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 458601

Enc. Submitted documents

cc: Requestor
(w/o enclosures)
