



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2012

Ms. Elizabeth White
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OR2012-11544

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# 460451 (PIR #2030).

The City of League City Police Department (the "department"), which you represent, received a request for the personnel file of a named police officer, including any complaints filed against the officer. The department states the officer has no complaints against him, and the department will release some of the requested information.¹ The department claims some the information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.119, 552.122, 552.130, 552.136, 552.137, 552.140, and 552.147 of the Government Code. We have considered the department's claimed exceptions and reviewed the submitted sample of information.²

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 protected by other statutes such

¹The Act does not require a governmental body to disclose information that did not exist at the time it received the request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

as section 143.089 of the Local Government Code. The City of League City is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files relating to a police officer: a police officer's civil service file that the civil service director is required to maintain and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). Under section 143.089(a), the officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. Corpus Christi*, 109 S.W.3d 113,122 (Tex. App.—Austin 2003, no pet.).

All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released.³ *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

The department states Exhibit B is maintained in its internal personnel file under section 143.089(g). Thus, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.⁴

³We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

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

Next, we consider the department's arguments for the information in the officer's civil service file maintained under section 143.089(a). Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). Accordingly, the department must withhold the W-4 form we marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov't Code ch. 411, subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* § 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 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. We have marked the CHRI the department must withhold under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses section 560.003 of the Government Code, which exempts a biometric identifier from disclosure the Act. *Id.* § 560.003. "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. *Id.* § 560.001. Therefore, the department must withhold the fingerprints we marked under section 560.003.

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. *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 established. *Id.* at 681-82. 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 Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (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 intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). We have marked the information that is highly intimate or embarrassing and of no legitimate public concern that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.⁵ The department may not withhold the remainder under common-law privacy.

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). The department must withhold the officer's date of birth we marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and home telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the

⁵Because common-law privacy is dispositive, we do not address the department's section 552.136 assertion.

Government Code to keep such information confidential.⁶ 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. The department must withhold the officer's personal information we have marked under section 552.117(a)(2) of the Government Code.⁷ However, the department must release the information we have also marked that section 552.117(a)(2) does not except from disclosure.

Section 552.130(a)(1) of the Government Code provides information relating to a driver's license issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a)(1). The department must withhold the driver's license number and copy of the driver's license we have marked under section 552.130 of the Government Code. However, the department must release the state that issued the license because it is not information excepted by section 552.130.

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). The e-mail address we marked is not one excluded by section 552.137(c). Accordingly, the department must withhold the e-mail address we marked under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release.

The department asserts section 552.114 of the Government Code excepts the school transcripts from public disclosure. Section 552.114(a) excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." *Id.* § 552.114(a). However, the department is not an educational institution funded wholly or partly by state revenue. We therefore conclude the department may not withhold any information pursuant to section 552.114 of the Government Code.

The department also asserts section 552.115 of the Government Code excepts the birth certificate from public disclosure. Section 552.115(a) 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[.]" *Id.* § 552.115. Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The department maintains the birth certificate, not the Bureau of Vital Statistics or a local registration official; therefore, the department may not withhold the submitted birth certificate under section 552.115. *See Open Records Decision No. 338 (1982).*

⁶Although the department seeks to withhold information under section 552.1175 of the Government Code, we note this exception does not apply to the personnel file at issue because section 552.1175 applies to information a governmental body does not hold in its capacity as an employer.

⁷Because section 552.117(a)(2) is dispositive, we do not address the department's section 552.147 assertion.

Next, the department asserts section 855.115 of the Government Code, which is also encompassed by section 552.101 and protects “[i]nformation contained in records that are in the custody of the [Texas Municipal Retirement System.]” Gov’t Code § 855.115(a). The department rather than the Texas Municipal Retirement System maintains all of the information at issue. Therefore, the department may not withhold the information under section 855.115.

Lastly, the department asserts sections 552.119, 552.122, and 552.140 of the Government Code. However, the department did not submit the officer’s photograph, test items, or a DD-214 form. Thus, the department may not withhold information under these exceptions. *See id.* §§ 552.119 (excepts peace officer’s photograph from disclosure if release would endanger officer’s life), .122 (excepts test items from disclosure), .140 (makes confidential DD-214 form under certain circumstances). The department also seeks to withhold information obtained from a polygraph examination, a Form I-9, information subject to the American with Disabilities Act of 1990, and information subject to section 12.003 of the Human Resources Code. *See Occ. Code* § 1703.306 (makes confidential information obtained from polygraph examination); 8 U.S.C. § 1324a(b)(5) (Form I-9 “may not be used for purposes other than for enforcement of this chapter”); 42 U.S.C. §§ 12101 *et seq.* (information about the medical conditions and medical histories of applicants or employees must be treated as confidential); *Hum. Res. Code* § 12.003 (makes confidential information concerning persons applying for or receiving assistance from health agencies’ assistance programs). However, the department also did not submit any such information. Section 552.301(e)(1)(A) requires a governmental agency to submit the requested information or a representative sample of such information and the arguments for the information it seeks to withhold. Gov’t Code § 552.301(a)(1)(A). Thus, the department should only submit assertions for information that it actually submits to this office seeking to withhold. Accordingly, the department may not withhold any requested information under these provisions.

In summary, the department must withhold the following information under section 552.101 of the Government Code: 1) Exhibit B in conjunction with section 143.089(g) of the Local Government Code; 2) the W-4 form in conjunction with section 6103(a) of title 26 of the United States Code; 3) the CHRI we have marked in conjunction with section 411.083 of the Government Code; 4) the fingerprints in conjunction with section 560.003 of the Government Code; and 5) the information we have marked in conjunction with common-law privacy. The department must withhold 1) the officer’s date of birth we have marked under section 552.102(a) of the Government Code; 2) the officer’s personal information under section 552.117(a)(2) of the Government Code; 3) the driver’s license information we have marked under section 552.130 of the Government Code; and 4) the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address affirmatively consent to its release. The department must release the remaining information.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/bs

Ref: ID# 460451

Enc. Marked documents

c: Requestor
(w/o enclosures)