



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2012

Mr. Stephen A. Cumbie
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2012-13312

Dear Mr. Cumbie:

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# 462716 (PIR# W017516).

The City of Fort Worth (the "city") received a request for all records concerning the employment, tenure, discipline, and resignation or termination of a named police officer. You state the city will redact some information under sections 552.130 and 552.147 of the Government Code and pursuant to the previous determinations issued to the city in Open Records Letter Nos. 2007-00198 (2007) and 2006-14726 (2006).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, 552.122, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you have submitted pertains to officers other than the one named by the requestor. Thus, this information is not responsive to the request. This ruling does not address the public availability of information that is not responsive, and the city is not required to release non-responsive information.

¹Section 552.130 of the Government Code permits a governmental body to redact motor vehicle record information subject to subsections 552.130(a)(1) and 552.130(a)(3) without the necessity of requesting a decision from this office. *See* Gov't Code § 552.130(c)-(e). Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. *See* Gov't Code § 552.147(b). Open Records Letter Nos. 2007-00198 and 2006-14726 are previous determinations authorizing the city to withhold certain information subject to section 552.130(a)(2) of the Government Code without requesting a decision from this office.

Section 552.101 of the Government Code exempts 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 section 143.089 of the Local Government Code. You state the City of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer’s civil service file and another that the police department may maintain for its own internal use. See 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 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; see Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). 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 police 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). However, a document relating to a police officer’s alleged misconduct may not be placed in his civil service file if there is insufficient evidence to sustain the charge of misconduct. Local Gov’t Code § 143.089(b). Information that reasonably relates to a police 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. *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You explain the city’s police department maintains the information you have indicated in the officer’s departmental file pursuant to section 143.089(g), and no disciplinary action was taken against the officer as part of the investigation at issue. Based on your representation and our review, we find the city must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. 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.

Occ. Code § 159.002(b)-(c). 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 on receipt of the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the 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 consists of medical records that are subject to the MPA. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with the MPA, unless the city receives proper written consent that complies with the MPA. *See* Occ. Code § 159.005.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides:

(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

(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 [TCLEOSE]. A declaration is not public information.

Id. § 1701.306(a), (b). Upon review, we find the city must 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 in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of an F-5 form (“Report of Separation of Licensee”) submitted to TCLEOSE under subchapter J of chapter 1701 of the Occupations Code. We note the F-5 form you have marked was created prior to the effective date of the amendment of section 1701.454 by the Seventy-ninth Legislature. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 4, 2005 Tex. Gen. Laws 4094, 4096. Thus, the F-5 form you have marked is governed by the previous version of section 1701.454. *See id.* § 6.² Section 1701.454 previously provided as follows:

(a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, 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 subsection, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head’s designee makes a written request on the agency’s letterhead for the report or statement accompanied by the agency head’s or designee’s signature; and

²Section 6 of the amending legislation states that “[t]he changes in law made by this Act in relation to employment termination reports apply only to an employment termination report under Subchapter J, Chapter 1701, Occupations Code, regarding a resignation or termination that occurs on or after the effective date of this Act. An employment termination report regarding a resignation or termination that occurs before the effective date of this Act is governed by the law as it existed immediately before the effective date, and that law is continued in effect for that purpose.” Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096.

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCLEOSE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. Upon review, we find the F-5 form you have marked is not subject to release under the provisions of section 1701.454. Accordingly, the city must withhold the F-5 form you have marked 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 section 1703.306 of the Occupations Code, which states, “[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 [.]” *Id.* § 1703.306. Upon review, we find the information you have marked is information acquired from a polygraph examination and is within the scope of section 1703.306. Accordingly, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.³

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. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565 at 7. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. 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) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). We note section 411.083 does not apply to active warrant information or other information relating to an individual’s current involvement with the criminal justice system. *See id.* § 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). Upon review, we find the information we have marked constitutes confidential CHRI that the city must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the

³As our ruling is dispositive, we do not address your argument under section 552.122 of the Government Code.

Government Code. However, the remaining information you have marked does not constitute CHRI and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). However, section 560.002 of the Government Code provides, “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Upon review, we find the city must withhold the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 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. *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 that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). A compilation of an individual’s criminal history also is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouses files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance, particularly those who are involved in law enforcement. *See* Open Records Decision Nos. 562 at 10, 542 at 5 (1990); 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee’s qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). In this instance, the criminal history information you seek to withhold pertains to a former police officer

employed by the city, not a private citizen. Because the this criminal history information 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 under 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 may be withheld under section 552.101 of the Government Code 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 date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note a post office box number is not a "home address" for purposes of section 552.117. *See* Open Records Decision No. 622 at 6 (legislative history makes clear purpose of section 552.117 is to protect public employees from being harassed at home). The submitted information contains information pertaining to a former police officer. If the named officer is still a licensed peace officer, the city must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code.

If the former police officer is no longer a licensed peace officer, then his personal information might be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) protects the same information as section 552.117(a)(2) for current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.117(a)(1), .024. 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request

under section 552.024 the information be kept confidential. Accordingly, to the extent the former police officer timely requested confidentiality under section 552.024 of the Government Code, the city must withhold his personal information under section 552.117(a)(1) of the Government Code.⁴

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. See Gov't Code § 552.1175. We note a post office box is not a "home address." See ORD 622 at 6. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). You have identified individuals who are peace officers for entities other than the city. To the extent these individuals elect to keep their personal information confidential, the city must withhold the information you have marked, with the exception of the post office box number, under section 552.1175 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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(b); see *id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, the city must withhold the following information under section 552.101 of the Government Code: (1) the information you have indicated in conjunction with section 143.089(g) of the Local Government Code; (2) the medical records we have marked in conjunction with the MPA, unless the city receives proper written consent that complies with the MPA; (3) the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms you have marked in conjunction with section 1701.306 of the Occupations Code; (4) the F-5 form you have marked in conjunction with section 1701.454 of the Occupations Code; (5) the information we have marked in conjunction with section 1703.306 of the Occupations Code; (6) the CHRI we have marked in conjunction with section 411.083 of the Government Code; (7) the fingerprints we have marked in conjunction with section 560.003 of the Government Code; and (8) the information we have marked in conjunction with common-law privacy. The city must withhold the date of birth we have marked under section 552.102(a) of the Government Code. To the extent the named officer is still a licensed peace officer, the city must withhold

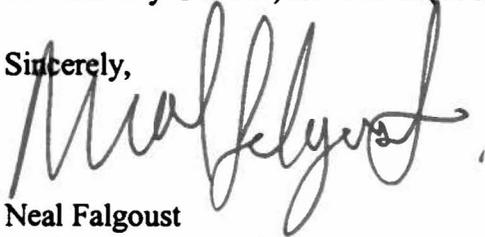
⁴Regardless of the applicability of either subsections 552.117(a)(2) or 552.117(a)(1), we note the city may withhold the police officer's social security number under section 552.147 of the Government Code without requesting a decision from this office. See Gov't Code § 552.147(b).

the personal information we have marked under section 552.117(a)(2) of the Government Code. If he is not a licensed peace officer, the city must withhold the information we have marked under section 552.117(a)(1), but only if he timely requested to keep the information confidential. To the extent the other peace officers not employed by the city elect to keep their personal information confidential, the city must withhold the information you have marked, with the exception of the post office box number, under section 552.1175 of the Government Code. The city must withhold the insurance policy numbers 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 462716

Enc. Submitted documents

c: Requestor
(w/o enclosures)